

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917

No. 126

J. H. BRADER, PLAINTIFF IN ERROR,

vs.

RACHEL JAMES, FORMERLY RACHEL REEVES.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

FILED MARCH 29, 1918.

(25,190)



(25,190)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 415.

J. H. BRADER, PLAINTIFF IN ERROR,

vs.

RACHEL JAMES, FORMERLY RACHEL REEVES.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

INDEX.

Original. Print

Clerk's return to writ of error.....	a	1
Citation and service.....	1	1
Petition for writ of error and allowance.....	2	3
Writ of error.....	8	6
Bond on writ of error.....	9	7
Petition in error.....	11	8
Exhibit X—Case-made from the district court of Choctaw county	13	9
Petition	14	9
Praecipe for summons.....	16	11
Summons and sheriff's return.....	17	11
Answer	19	13
Exhibit A—Warranty deed, James to Brader, Au- gust 17, 1907.....	22	14
Certificate of David James, &c.....	24	15
B—Quit-claim deed, Tille Brader to J. M. Brader, September 13, 1909.....	25	16
C—Homestead patent, No. 5397.....	27	17

	Original.	Print
Demurrer to answer.....	29	19
Journal entries	30	19
Order sustaining demurrer.....	30	20
Judgment	30	20
Order granting time to prepare case-made, &c.....	33	21
Clerk's certificate	34	21
Journal entry advancing cause.....	35	22
Journal entry submitting cause.....	36	22
Judgment	37	22
Opinion, Sharp, J.....	38	23
Petition for rehearing.....	56	35
Journal entry staying mandate.....	60	37
Journal entry granting time to file brief.....	61	37
Journal entry granting leave to file <i>amicus curiæ</i> brief.....	62	37
Journal entry extending time for briefs.....	63	38
Judgment on rehearing.....	64	38
Opinion, Sharp, J., on rehearing.....	65	39
Journal entry staying mandate.....	88	55
Journal entry filing dissenting opinion, Hardy, J.....	89	55
Dissenting opinion, Hardy, J.....	90	56
Clerk's certificate	105	56

a

Return to Writ.

In obedience to the commands of the within writ I herewith transmit to the Supreme Court of the United States a duly-certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Oklahoma, in the City of Oklahoma City, this 2nd day of March, 1916.

[Seal Supreme Court, State of Oklahoma.]

WM. M. FRANKLIN,
Clerk of the Supreme Court of the State of Oklahoma.

1 Filed Mar. 2, 1916. William M. Franklin, Clerk.

In the Supreme Court of the United States of America, ss.

No. 4721.

J. H. BRADER (Full Name, JOHN H. BRADER), Plaintiff in Error,
vs.
RACHEL JAMES, Formerly RACHEL REEVES, Defendant in Error.

THE UNITED STATES OF AMERICA, ss:

The President of the United States of America to the said Rachel James, formerly Rachel Reeves, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the Supreme Court of the State of Oklahoma, wherein the said J. H. Brader is plaintiff in error and you are defendant in error in cause No. 4721 in said court to be and appear before the said Supreme Court of the United States and show cause if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Chief Justice of the Supreme Court of the State of Oklahoma this the 23 day of Feb'y, 1916.

[SEAL.]

MATTHEW J. KANE,
Chief Justice of the Supreme Court of Oklahoma.

Attest:

[Seal Supreme Court, State of Oklahoma.]

WM. M. FRANKLIN,
Clerk of Supreme Court of Oklahoma,

By G. C. STARK, Deputy.

To John Q. Bills, of Hugo, Oklahoma:

You are hereby authorized and deputized to make service of the above and foregoing citation on said Rachel James Formerly Rachel Reeves and make due return of said service under oath endorsed hereon showing as is required by law your proceedings in the premises.

Dated this the 23 day of Feb'y, 1916.

[SEAL.]

MATTHEW J. KANE,

Chief Justice of the Supreme Court of Oklahoma.

Attest:

[Seal Supreme Court, State of Oklahoma.]

WM. M. FRANKLIN,

Clerk of the Supreme Court of Oklahoma.

By G. C. STARK, *Deputy.*

STATE OF OKLAHOMA.

County of Choctaw, ss:

John Q. Bills of lawful age, being first duly sworn on oath deposes and says: I was duly authorized and deputized by Hon. Mathew J. Kane Chief Justice of the Supreme Court of Oklahoma, to serve upon the said Rachel James formerly Rachel Reeves the above and foregoing citation, and that I served the same upon said Rachel James formerly Rachel Reeves as such defendant in error by delivering personally to her, a true and exact copy of the above and foregoing citation with all the endorsements thereon in McCurtain County Oklahoma on the 28th day of February 1916 and at the same time and place reading to her this identical citation and allowing her to inspect the same.

And that I further made service of the above citation by delivering to the firm of lawyers consisting of Works and Copping the attorneys of record for said Rachel James formerly Rachel Reeves a true and exact copy of the foregoing citation with all the endorsements thereon on the 29th day of Feb'y, 1916 and then and there announced to them that said service of said citation was made on them by me under my authority in the premises as the attorneys of record for said plaintiff in error and then and there offering to read to F. D. Copping as such counsel the foregoing citation.

Dated this the 29th day of February 1916.

JOHN Q. BILLS.

Subscribed and sworn to before me the undersigned Notary Public on this the 29th day of February 1916.

[Seal J. T. Deweese, Notary Public, Choctaw Co., Okla.]

JOHN Q. BILLS.

J. T. DEWEESE,

Notary Public within and for Choctaw

County, Oklahoma.

My commission expires April 14th 1917.

2 *Petition for Allowance of a Writ of Error from the Supreme
Court of the United States.*

In the Supreme Court of the State of Oklahoma.

No. 4721.

J. H. BRADER, Plaintiff in Error,

vs.

RACHEL JAMES (Formerly RACHEL REEVES), Defendant in Error.

To the Honorable Mathew J. Kane, Chief Justice of the Supreme Court of the State of Oklahoma:

The petitioner, said J. H. Brader, respectfully shows that he is a resident of Hugo, Choctaw County, State of Oklahoma; that on the 11th day of January 1916, the Supreme Court of the State of Oklahoma, rendered final judgment against him in the above entitled cause, cancelling a deed from defendant in error to Tillie Brader, his predecessor in interest, by which judgment said Supreme Court finally adjudged his title to the lands sued for herein to be void. And that said Supreme Court of the State of Oklahoma is the highest court of said State in which a decision of this action could be had. That thereby manifest error has occurred greatly to his damage, whereby petitioner feels aggrieved.

That in the record and proceedings it will appear that there was drawn in question the construction of Section 22 of the Act of Congress Approved April 26, 1906, (34 Stat. L. 137) Chapter —; and the decision was against the right and privilege necessarily drawn into question, and especially set up and claimed by plaintiff in error under the said section of said Act of Congress.

3 That the plaintiff in error claimed and asserted in said proceedings and that the same was necessarily called into question, that by virtue of Section 12 of the Act of Congress Approved July 1, 1902, (32 Stat. L. c. 1362, p. —) said lands inherited by said defendant in error on the 27 day of & Oct., 1905, had thereby passed to her freed from all governmental restrictions or control, and free from all restraints on alienation contained in said act of Congress of 1902; and that said section 22 of said Act of 1906 thereafter passed, was not designed to affect unrestricted lands either by allowing same to be sold or by requiring the approval contained in said section; and that therefore said deed of said lands made to his predecessor in interest on the 18th day of August, 1907, by the defendant in error, a duly enrolled full-blood Choctaw Indian, did not require the approval of the Secretary of the Interior.

That specifically said judgment of the Supreme Court of Oklahoma decided that although said lands had passed free from all restrictions against alienation upon the death of the allottee in the year 1905, that said section 22 of said act of Congress of 1906, had the effect of requiring an approval of said deed made as aforesaid in the year 1907; that the said being unapproved by the Secretary of

the Interior, as is required of all conveyances falling within the purview of said section, is void and therefore the title of the plaintiff in error to the lands sued for was void and illegal and in violation of the provisions of said section 22, requiring approval, and that said section 22, so requiring approval, had the effect of

4 reimposing restrictions upon said lands.

That said Court further decided that said section 22, given the effect aforesaid, was a constitutional enactment and was within the powers given to Congress by the Constitution of the United States, and that Congress had the power under the Constitution of the United States to reimpose said restrictions against alienation of said lands, although said defendant in error was made a full citizen of the United States by the Act of Congress of M'ch 3d 1901 (31 Stat. L. c. 868, p. 1447); and as such citizen, had held said lands wholly unrestricted from the said date in the year 1905 to the date of the approval of said section 22 of said act of Congress of 1906. All of which is fully apparent in the record and proceedings in the cause, and specifically set forth in the assignment of errors filed herewith:

First. That said Supreme Court erred in holding and deciding that said Section 22 of said Act of Congress Approved April 26, 1906, (34 U. S. Stat. L. c. — p. 137), providing:

"* * * All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior under such rules and regulations as he may prescribe."

applied to and required an approval of said deed of conveyance from said defendant in error to said Tillie Brader, the predecessor in interest of plaintiff in error, dated August 18, 1907; and therefore that the title of plaintiff in error to the property sued for was void.

5 Second. That the said Supreme Court erred in holding and deciding that said provision requiring approval applied to said deed made as aforesaid by the defendant in error, an heir, who is a full blood Choctaw Indian, and that the lands in controversy inherited by her from the full blood Indian allottee of said Tribe, could not be conveyed and her title thereto divested without the approval of the Secretary of the Interior.

Third. Section 22 of said Act of April 26, 1906, among other things, provides:

"That the adult heir of any deceased Indian of either of the Five Civilized Tribes, whose selection has been made, or to whom a deed or patent has been issued, for his or her share of the lands of the Tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent."

"All conveyances made under this provision by heirs who are full blood Indians are to be subject to the approval of the Secretary of the Interior under such rules and regulations as he may prescribe."

That said Supreme Court erred in holding and deciding that the defendant in error could not convey and did not convey and thereby vest her purchaser, the said Tillie Brader, and under her the plain-

tiff in error, a good and indefeasible title to the lands in controversy without the approval of the Secretary of the Interior under rules and regulations prescribed by him; such lands having been inherited by her, a full-blood Indian, and member of the Choctaw Tribe, from said full-blood Allottee of said Tribe, from whom same was inherited; and in holding and deciding that the above provisions of said section 22 were operative and applicable to said inherited lands sold as aforesaid, and did affect the status and right of alienation of such lands as provided by requiring the approval of the Secretary of the Interior.

Fourth. That said Supreme Court erred in affirming the judgment and decree of the trial court rendered in said cause and in refusing and denying to plaintiff in error the rights afforded him under the Acts of Congress aforesaid.

Fifth. That said Supreme Court of the State of Oklahoma, erred in holding and deciding that said section 22 of said act of 1906, given the aforesaid effect, was within the power given to Congress by the Constitution of the United States and was therefore a valid exercise of the law-making power vested in Congress under the express and implied provisions of the Constitution of the United States.

Sixth. That said court erred in deciding that said section 22 giving it said effect was a valid and Constitutional enactment and not in conflict with that part of the 5th Amendment to the Constitution of the United States which provides:

"That no person shall be deprived of life, liberty or property without due process of law."

And in holding and deciding that said lands so held by the defendant in error from said date in 1905 to the date of the approval of the act of April 26, 1906, were subject to be withdrawn from alienation by the defendant in error, regardless of her property rights then vested, and regardless of her admitted citizenship.

Wherefore, petitioner prays for a writ of error, from said decision and judgment, to the Supreme Court of the U. S. that a transcript of the record, proceedings and papers upon which said judgment and decree was rendered and entered, duly authenticated, be ordered sent to the Supreme Court of the United States at Washington, D. C., under the rules of said Court in such cases made and provided, and that the same be inspected and corrected as according to law and justice; and for an order fixing the amount of supersedeas bond; and that the judgment of said Supreme Court of the State of Oklahoma be reversed, set aside and held for naught, and that a judgment and decree be rendered for plaintiff in error herein granting him his rights under the laws of the United States; and also prays judgment for his costs.

J. H. BRADER.

E. A. BLYTH.

Att'y for Plff in Error.

STATE OF OKLAHOMA,
Supreme Court, ss:

Let the writ of error issue upon the execution of a bond by the said J. H. Brader to the said Rachel James, (formerly Rachel Reeves), in the sum of \$1,500.00; such bond when approved to act as a supersedeas.

Dated this 5 day of Feb'y 1916.

[Seal Supreme Court, State of Oklahoma.]

MATTHEW J. KANE,
*Chief Justice of the Supreme Court
 of the State of Oklahoma.*

Attest:

WM. M. FRANKLIN, *Clerk*,
 By N. C. ORR, *Deputy*.

Rec.

[Endorsed:] Filed Feb. 5, 1916. William M. Franklin, Clerk.
 Rec.

8 Filed Feb. 22, 1916. William M. Franklin, Clerk.

Received Feb. 22, 1916, ———, Clerk.

Writ of Error.

In the Supreme Court of the United States of America.

J. H. BRADER, Plaintiff in Error,

vs.

RACHEL JAMES, Formerly RACHEL REEVES, Defendant in Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Judges of the Supreme Court of the State of Oklahoma, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment of a plea which is in the said court before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said Suit between J. H. Brader, Plaintiff in Error and Rachel James formerly Rachel Reeves Defendant in Error No. 4271, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States and the decision was against their validity or wherein was drawn in question the validity of a statute of, or an authority exercised under said state, on the grounds of their being repugnant to the Constitution, Laws or treaties of the United States and the decision was in favor of their validity *such*; or wherein was drawn in question the construction of a clause of the constitution or a treaty

of or commission held under the United States and the decision was against the title, right, privilege or immunity or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or exemption or commission; a manifest error hath happened to the great damage of the said J. H. Brader as by his complaint appears. We being willing that error if any hath been should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf do command you if judgment be therein given that then under your seal, distinctly and openly you send the record and proceedings aforesaid with all things concerning the same to the United States Supreme Court, together with this writ, so that you have the same in the said Supreme Court at Washington, within Thirty Days from the date hereof, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable E. D. White, Chief Justice of the United States, the 14 day of February 1916.

[Seal of the United States District Court, Western District
of Oklahoma.]

ARNOLD C. DOLDE,
*Clerk of the United States District Court for the
Western District of the State of Oklahoma.*

Allowed February 5th 1916.

MATTHEW J. KANE,
*Chief Justice of the Supreme
Court of Oklahoma.*

9

Bond.

In the Supreme Court of the State of Oklahoma.

J. H. BRADER, Plaintiff in Error,

vs.

RACHEL JAMES, Formerly RACHEL REEVES, Defendant in Error.

Know all men by these presents, that we, the said J. H. Brader as principal and United States Fidelity and Guaranty Co. as sureties are held and firmly bound unto the said Rachel James formerly Rachel Reeves, the defendant in error above named in the sum of One Thousand Five Hundred Dollars to be paid to the said Rachel James, née Reeves, to which payment well and truly to be made, we bind ourselves jointly and severally firmly by these presents.

Sealed with our seals and dated this 29 day of January, 1916.

The condition of the above obligation is such that the above named plaintiff in error seeks to prosecute his writ of error to the Supreme Court of the United States to reverse the judgment ren-

dered and entered in the above entitled and numbered action by the Supreme Court of Oklahoma.

Now if the above named plaintiff in error shall prosecute its said writ of error to effect and answer all costs and damages that may be adjudged if he shall fail to make good his plea, then this obligation to be void, otherwise to remain in full force and effect.

J. H. BRADER,

Plaintiff in Error.

UNITED STATES FIDELITY AND
GUARANTY CO.,

By A. J. WEIR, *Agent.*

CHARLES BOZARTH,

Attorney in Fact.

[SEAL.]

Jan'y 29, 1916.

10 The above and foregoing bond approved, same to operate as a supersedeas.

Dated this the 5 day of Feb'y, 1916.

MATTHEW J. KANE,

*Chief Justice of the Supreme Court
of the State of Oklahoma.*

Endorsed: Filed Feb. 5, 1916. William M. Franklin, Clerk.

11 Filed Jan. 11, 1913. W. H. L. Campbell, Clerk.

Petition in Error.

In the Supreme Court of the State of Oklahoma.

#4721.

J. H. BRADER, Plaintiff in Error,

vs.

RACHEL JAMES, Formerly RACHEL REEVES, Defendant in Error.

Petition in Error.

The said J. H. Brader plaintiff in error, complains of said defendant in error, for that the said Rachel James formerly Rachel Reeves at the October 1912 term of the district court of Choctaw County, Oklahoma, recovered a judgment by the consideration of said court, against the said J. H. Brader in a certain action then pending in said court, wherein the said Rachel James formerly Rachel Reeves was plaintiff and the said J. H. Brader was defendant. A certified transcript of the record of said court is hereunto attached marked Exhibit X and made a part of this petition in error; and the said J. H. Brader avers that there is error in the said record and proceedings, in this, to wit:

1. Said court erred in sustaining the demurrer of the plaintiff

to the answer of the defendant and in ordering, adjudging and decreeing the plaintiff to be the owner in fee simple of the lands herein described and entitled to the immediate possession thereof.

2. Said court erred in not taking all matters of fact well set out in defendant's answer as true after defendant below had elected to stand on the ruling of the court in sustaining the said demurrer.

3. Said court erred in directing the parties to this action to introduce evidence as to the value of improvements placed on this land by plaintiff in error, and in offsetting the improvements so found against the rents and profits of the lands for the time plaintiff in error was in possession of the same.

4. Said court erred in disregarding the purchase price paid for said land by the plaintiff in error.

5. Said court erred in giving judgment for the plaintiff below in the sum of \$250.00 for rent of the said premises and in decreeing the defendant in error to be the owner in fee simple of this said property and in quieting his title thereto.

Wherefore, the plaintiff in error prays that said judgment so rendered may be reversed, set aside and held for naught, and that a judgment may be rendered in favor of the plaintiff in error upon the pleadings herein, and that the plaintiff in error be restored to all rights that he has lost by the rendition of such judgment, and for such other relief as to the court may seem just.

J. H. BRADER,

By His Attorneys, DOWNS & ELLIS, AND
E. H. BLYTHE.

13 "EXHIBIT X."

In the District Court of Choctaw County, State of Oklahoma.

Case No. 1069.

RACHEL JAMES, Formerly RACHEL REEVES, Plaintiff,
vs.

J. H. BRADER, Defendant.

TRANSCRIPT.

Filed Jan. 11, 1913. W. H. L. Campbell, Clerk.

14 STATE OF OKLAHOMA,
Choctaw County, ss:

In the District Court.

RACHEL JAMES, Formerly RACHEL REEVES, Plaintiff,
vs.

J. H. BRADER, Defendant.

Petition.

Comes now the plaintiff, Rachel James, formerly Rachel Reeves and would show to the court that all the parties to this suit are resi-

dents of the State of Oklahoma, and that the real estate in controversy as hereinafter shown is located in Choctaw County of said state. For cause of action against the defendant, plaintiff alleges and states

1.

That Serena Wallace was a full blood Indian, enrolled as full blood opposite Number 3213 of the approved rolls of the Commission to the Five Civilized Tribes, and as such Indian was allotted among other lands, the following, to wit:

N. E. $\frac{1}{4}$ of sec. 27, Township Six (6) South, Range Sixteen East, and N. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of Section twenty-nine (29) Township Five (5) South, Range Fifteen East of the Indian Base and Meridian.

2.

That on or about the 27th day of Oct. 1905, the said Serena Wallace died intestate, and leaving as her sole and only heir at law, the plaintiff Rachel James, formerly Rachel Reeves, who is a duly enrolled member of the Choctaw Tribe of Indians, and who is the daughter of Serena Wallace; that said Rachel Reeves, now James is now and has been since the death of the said Serena Wallace the owner of the above described lands, and entitled to the immediate possession of the same.

15

3.

Plaintiff further alleges that on or about January 1, 1908, the defendant J. H. Brader unlawfully intruded upon and took possession of said lands, and has been in possession and enjoyed the use and benefit of said lands ever since, without the consent and against the will of this plaintiff; that J. H. Brader has held and still holds possession of said lands and has enjoyed the use and benefit of same since Jan. 1, 1908, and refuses to vacate altho possession from him has often been demanded.

4.

Plaintiff alleges she has been damaged in her property rights as follows: For the unlawful intrusion and occupancy of said lands \$200.00; for the use and benefit of said lands and the reasonable value of the rents therefrom \$300.00, making a total of \$500.00.

5.

Wherefore, premises considered, plaintiff prays that upon final hearing hereof she have judgment for the recovery of said lands and premises; that the court make, enter and enforce its order ejecting the defendant, J. H. Brader therefrom; that the plaintiff have damages against the defendant J. H. Brader in the sum of \$500.00 for the unlawful detention and use of said premises, and

that plaintiff's title be quieted and adjudged and decreed to be absolute.

(Signed)

WORKS & COPPING,
Attorneys for Plaintiff.

Endorsed as follows: No. 1069—In District Court, Choctaw County, Oklahoma—Rachel James, plaintiff, vs. J. H. Brader, Defendant—Petition—Original—Filed August 28, 1912. T. W. Hunter, Clerk District Court, By E. A. Burke, Deputy.—Works & Copping —.

16 In the District Court of Choctaw County, Oklahoma.

RACHEL JAMES, Plaintiff,

vs.

J. H. BRADER, Defendant.

To the Clerk of said Court:

Issue alias summons in the above entitled cause, and direct the same to the Sheriff of Choctaw County, Oklahoma, to or for the defendants J. H. Brader.

Amount claimed \$500 damages and ejectment.

Action brought for ejectment and to quiet title.

Make summons returnable 7th day of Sept. 1911.

Defendants required to answer on or before the 27 day of Sept. 1912.

Dated this 29th day of August, 1912.

(Signed)

WORKS & COPPING,
F. D. COPPING,
Attorney for Plaintiff.

(Endorsed:) Filed August 28, 1912. T. W. Hunter, Clerk, By E. A. Burke, Deputy.

17 *Summons.*

In the District Court of Choctaw County, State of Oklahoma, Sixth Judicial District of the State of Oklahoma.

STATE OF OKLAHOMA,
Choctaw County, ss:

To the State of Oklahoma, to the Sheriff of Choctaw County, State of Oklahoma, Greetings:

You are hereby commanded to notify J. H. Brader that he has been sued by Rachel Reeves in the District Court of Choctaw County, State of Oklahoma, and that he must answer the petition of the said Rachel James, formerly Rachel Reeves filed against him in the office of the Clerk of the said Court, on or before the 27th day of September, 1912, or the said petition will be taken as true, and judgment will be rendered accordingly.

You will make due return of this summons on or before the 7th day of September, 1912.

Given under my hand and the seal of the said District Court at my office in the city of Hugo, Choctaw County, State of Oklahoma, the 28th day of August, 1912.

(Signed)

[SEAL.]

T. W. HUNTER,
Clerk of the District Court,
By E. A. BURKE,
Deputy Clerk.

Suit Brought for Ejectment and to quiet title.

If the defendant fail to answer, judgment will be taken for the sum of \$500.00 with interest thereon at the rate of — per centum per annum from the — day of — 191— and costs of suit.

(Signed)

T. W. HUNTER,
Clerk of the District Court,
By E. A. BURKE,
Deputy Clerk.

Endorsed: Issued August 28, 1912. Returnable Sept. 7, 1912. Answer due Sept. 27, 1912. Filed Aug. 31, 1912. T. W. Hunter, Clerk, By E. A. Burke, Deputy.

18

Return of Sheriff.

STATE OF OKLAHOMA,

Choctaw County, ss:

I received this summons on the 23 day of August, 1912, at 4 o'clock A. M., and served the same in my county by delivering a true copy of the within summons, with all the endorsements thereon, to the within named defendant J H Brader personally on the 30 day of August, 1912.

And I served the same by leaving a true copy of the within summons at the usual place of residence of the within named defendant — with — a member of h- family over fifteen years of age in my county, on the — day of — 191—.

I cannot find the within named defendant & — in my county.

Dated this — day of — 191—.

(Signed)

W. L. LOFTIN,
Sheriff of Choctaw County, Okla.,
By G. H. BIRCHFIELD, Deputy.

Sheriff's Fees.

Service first person.....	\$.50
— and additional persons — cop — I.....	\$.25
Not found.....	
Mileage — Miles.....	
Total	\$.75

19

Defendant's Original Answer.

STATE OF OKLAHOMA,
Choctaw County, ss:

In the District Court.

Case No. —.

RACHEL JAMES, Formerly RACHEL REEVES, Plaintiff,

vs.

J. H. BRADER, Defendant.

Answer.

1. Comes now J. H. Brader the above named defendant and for answer to the petition of plaintiff herein says, that he denies generally and specifically each and every and all the allegations in said petition contained, except as such as is hereinafter admitted.

2. Defendant admits that all the parties to this suit are residents of the State of Oklahoma, that the real estate in controversy is located in Choctaw County, Oklahoma.

3. Defendant admits the truth of the allegations contained in subdivision numbered one of plaintiff's petition.

4. Defendant admits the death of Serena Wallace on or about the 27th day of October, 1905, and that she died intestate and that she left as her sole and only heir-at-law her daughter Rachel James, née Reeves, the plaintiff in this action and that said plaintiff is a full blood Indian.

5. And for further defense to the petition of plaintiff herein defendant alleges and states that on the 17th day of August, 1907, and for and in consideration of \$900.00 in hand paid to the said plaintiff herein by Tillie Brader, that the said Rachel James Née Reeves, conveyed to the said Tillie Brader by general warranty deed the property heretofore described in the petition of plaintiff as the property now held by the defendant herein, a copy of which deed is herewith filed marked exhibit (A) and made a part hereof. The N. E. $\frac{1}{4}$ of section 27, T. 6 S. R. 16 E., having been allotted as a homestead and that certificate of allotment issued on said land on August 27th, 1903, and that the U. S. Gov't issued a patent therefor December 24th, 1904, a copy of which is hereby attached marked Exhibit (C) and made a part hereof.

6. And that the said deed of conveyance last above described was placed of record at eight A. M. with the recorder of deeds at Antlers, Oklahoma, on September 20th, 1907.

7. And that said Tillie Brader on September the 13th 1909 deeded all of the said lands to the defendant herein which conveyance was duly filed for record with the recorder of deeds for this county on the 17th day of February, 1911, a copy of which conveyance is herewith filed marked exhibit (B) and made a part hereof.

8. And for further defense to the said petition of plaintiff filed herein defendant alleges and states that shortly after having taken possession of the said premises defendant made improvements thereon to the amount of \$1,000.00 to wit: the building of two sets of houses \$500.00, repairs on buildings erected by plaintiff and her mother \$50.00, the construction of fences surrounding the said premises \$125.00 and clearing land \$325.00.

9. Defendant alleges and states that the said deed of conveyance last above described is his authority for taking possession of the said premises and that he has not disposed of this property and that he is still vested with the ownership of the same by reason of the said deed of conveyance from the said Tillie Brader to himself.

21 10. Wherefore he prays that said suit of plaintiff be dismissed and that he be allowed his costs herein and that his title be quieted and for all other legal and equitable relief to which he is entitled.

(Signed)

J. H. BRADER.

STATE OF OKLAHOMA.

Choctaw County, ss:

Personally appeared before me on this 19th day of Sept., 1912, J. H. Brader to me known and said that he had read the within and foregoing petition and that the facts stated therein are true.

(Signed)

[SEAL.]

T. O. NELSON, N. P.

My Commission expires March 6th, 1916.

E. A. BLYTHE AND
DOWNS & ELLIS,

Att'ys for Def't.

22

EXHIBIT (A).

Warranty Deed.

This warranty deed, made the 17th day of August, 1907, by and between Davis James and Rachel James, husband and wife, of Central District Indian Territory, parties of the first part, and Tillie Brader party of the second part:

Witnesseth: That for and in consideration of the sum of Nine Hundred Dollars cash in hand paid by the said party of the second part to the said parties of the first part, the receipt of which is hereby acknowledged, do hereby give, grant, bargain, sell and convey unto the said party of the second part, her heirs and assigns, all of a certain tract of estate situated in Choctaw Nation of the Indian Territory, bounded and described as follows:

The Northeast quarter of Section Twenty Seven (27) Township Six (6) South, and Range Sixteen East, also the Northwest Quarter of the Southeast Quarter of Section Twenty Nine (29) Township

Five (5) South, Range Fifteen (15) East of the Indian Base and Meridian in Indian Territory containing Two Hundred Acres, according to the official survey and plat thereof, together with all the privileges and rights, improvements and appurtenances thereunto belonging, forever in fee simple.

To have and to hold the same unto the said party of the second part, her heirs and assigns, in fee simple forever.

And the said parties of the first part for themselves and their heirs, executors, administrators and assigns, do hereby covenant with the said party of the second part, her heirs and assigns, that at the delivery hereof said first party was lawfully seized and possessed of an absolute and indefeasible estate of inheritance in fee simple in and to said real estate, and that the same is free and clear of all taxes, assessments, and incumbrances of any and all kinds whatsoever,

23 and that they have a good right to sell and convey the same unto the said second party as aforesaid, and that they will, and their heirs, executors and administrators shall forever warrant and defend the title thereto unto the said second party, her heirs, and assigns, against all lawful claims and demands of all persons whomsoever.

And for the consideration aforesaid, the said wife of the said Davis James does hereby release and relinquish, and quit-claims, transfer and convey all her right, claim or possibility of dower and homestead in said real estate to the said party of the second part in fee simple forever.

In witness whereof, the parties of the first part have hereunto set their hand- and seal-

DAVIS JAMES. [SEAL.]
RACHEL JAMES. [SEAL.]

Witnesses:

_____,

Copy.
(Seal.)

Exhibit (A).

24

EXHIBIT (A).

UNITED STATES OF AMERICA,
Indian Territory, Central District:

Personally appeared before Rush Record the undersigned authority, within and for said district and Territory David James and Rachel James whose names appear to the foregoing Warranty Deed as parties grantors, and stated and acknowledged to me that they executed the same as their free and voluntary act and deed for the consideration, uses and purposes therein set forth and contained, and I do so hereby certify.

And I further certify that Rachel James, wife of David James,

personally well known to me to be the person grantor whose name appears to the foregoing Warranty Deed voluntarily appeared before me and in the absence of her said husband she declared and acknowledged to me that she had executed said Warranty Deed and signed and sealed her relinquishment of dower and homestead therein of her own free will and accord for the consideration, uses and purposes therein set forth and contained, without due influence or compulsion of her said husband.

Subscribed and acknowledged before me this 17th day of August, 1907.

[SEAL.]

RUSH RECORD,
Notary Public.

My commission expires March 4th, 1911.

Exhibit (A).

25

EXHIBIT (B).

From Tillie Brader
to
J. M. Brader.

Quit Claim Deed.

This Indenture made this 13th day of of September A. D. 1909 between Tillie Brader a single person of the first part and J. H. Brader party of the second part, Witnesseth: That the said party of the first part in consideration of the sum of One Dollar to her duly paid, the receipt thereof is hereby acknowledged, has remised, released and quit-claimed and by these presents does for herself, her heirs, executors and administrators, remise, release, and forever quit-claim unto the said party of the second part and to his heirs and assigns forever, all her right, title, interest and estate, claim and demands, both at law and in equity and to all of the following described real property and premises situate in Choctaw County, State of Oklahoma, to wit: (omitting description of property not sued on in this action) N. E. $\frac{1}{4}$ Sec. 27, T. 6 S. R. 16 E. and the N. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of Sec. 29 T. 5 S. R. 15 E. of the Indian Base and Meridian, together with all and singular the hereditaments and appurtenances thereunto belonging, to have and to hold the above described premises unto the said J. H. Brader and his heirs and assigns, so that neither the said Tillie Brader nor any person in her name and behalf shall or will hereafter claim or demand any right or title or interest in and to the said premises or any part thereof but they and every one of them shall by these — be excluded and forever barred.

In witness whereof the said party of the first part has hereunto set her hand the day and year first above written.

(Signed)

TILLIE BRADER.

Executed in the presence of
W. J. McCONNELL.
M. U. BRIDEWELL.

26 STATE OF IOWA,
Des Moines County:

Before me, Wm. McConnell, a notary public in and for said county and State on the 13th day of September, 1909, personally appeared Tillie Brader unmarried to me known to be the identical person who executed the within and foregoing instrument and acknowledged to me that she executed the same as her free and voluntary act and deed for the uses and purposes therein set forth.

Witness my hand and official seal the year and date above set forth.

[SEAL.]

WM. J. McCONNELL,
Notary Public.

This instrument filed for record on the 16th day of Feb. A. D. 1911 at 2 p. m. and duly recorded on the seventeenth day of Feb. 1911.

J. A. PENNINGTON,
Register of Deeds.

Exhibit (B).

Endorsed: Filed September 20, 1912. T. W. Hunter, Clerk District Court. By E. A. Burke, Deputy.

27 EXHIBIT (C).

Homestead Patent No. 5397.

Choctaw by Blood, Roll No. 3213.

Date of Certificate, August 27, 1903.

The Choctaw and Chickasaw Nations, Indian Territory, to all to whom these presents shall come, Greetings:

Whereas, by the act of Congress approved July 1st, 1902 (32 Stat. 641) and ratified by the citizens of the Choctaw and Chickasaw Nations September 25th, 1902, it was provided that there should be allotted by the commission to the Five Civilized Tribes, to each citizen of the Choctaw and Chickasaw Nations, land equal in value to 320 acres of the average allot-able lands of the Choctaw and Chickasaw Nations; and

Whereas, it was provided by said Act of Congress that each member of said tribes shall, at the time of the selection of his allotment, designate, or have selected and designated for him, from his allotment, land equal in value to one hundred and sixty acres of the average allot-able land of the Choctaw and Chickasaw Nations, as nearly as may be as a homestead, for which separate certificate and patent shall issue; and

Whereas, the said Commission to the Five Civilized Tribes, has certified that the land hereinafter described has been selected by or

on behalf of Serena Wallace, a citizen of the Choctaw Nation, as a homestead,

Now, therefore, we, the undersigned, the principal chief of the Choctaw Nation and the Governor of the Chickasaw Nation, by virtue of the power and authority vested in us by the Twenty ninth section of the Act of Congress of the United States, approved June 28th, 1898, (3 Stat. 495) have granted and conveyed, and by these presents do grant and convey unto the said Serena Wallace all her right, title and interest of the Choctaw and Chickasaw Nations and of all other citizens of said Nations, in and to the following described land, viz:

The Northeast Quarter of Section Twenty Seven (27) Township Six (6) South and Range Sixteen (16) East, (Choctaw Nation) of the Indian Base and Meridian, in Indian Territory, containing one hundred and sixty (160) acres, more or less as the case may be, according to the United States Survey thereof, subject however, to the conditions provided by the Act of Congress approved July 1st, 1902 (32 Stat. 641) pertaining to allotted homesteads.

In witness whereof, we, the principal chief of the Choctaw Nation and the Governor of the Chickasaw Nation, have hereunto set our hands and caused the great seal of our respective Nations to be affixed at the dates hereinafter shown.

Date December 21, 1904.

[Seal of Choctaw Nation.]

GREEN McCURTAIN,

Principal Chief of the Choctaw Nation.

Date December 10, 1904.

[Seal of Chickasaw Nation.]

DOUGLAS H. JOHNSTON,

Governor of the Chickasaw Nation.

Exhibit (C).

Department of the Interior.

Approved August 28, 1905.

THOMAS RYAN,

Acting Secretary.

By OLIVA A. PHELPS, *Clerk.*

Endorsed: Filed for record on the 2 day of September, 1905, at 2 o'clock p. m. and recorded in Book 4 page 566. Tams Bixby, Commissioner to the Five Civilized Tribes. By Hal Belford, Clerk.

29

Demurrer to Answer.

In the District Court of Choctaw County, Oklahoma.

RACHEL JAMES, Formerly RACHEL REEVES, Plaintiff,

vs.

J. H. BRADER, Defendant.

Demurrer to Answer.

Comes now the plaintiff in the above numbered and styled cause, and for demurrer to the answer of the defendant herein, would allege as grounds for demurrer:

That the said answer of the defendant does not set forth facts sufficient to constitute a defense to the cause of action stated and alleged in plaintiff's petition herein; and of this the plaintiff prays the judgment of the court.

Wherefore, plaintiff prays as in her original petition.

(Signed)

WORKS & COPPING,

Attorneys for Plaintiff.

Endorsed: Filed September 30, 1912. T. W. Hunter, Clerk District Court. By E. A. Burke, Deputy.

30

Journal Entry.

STATE OF OKLAHOMA,
Choctaw County:

In the District Court.

No. 1069.

RACHEL JAMES (Formerly RACHEL REEVES), Plaintiff,

vs.

J. H. BRADER, Defendant.

Now, on this the 22nd day of October, 1912, same being a judicial day of the regular October 1912 term of this court, there coming on for hearing before the court the demurrer of the plaintiff herein, to the answer of the defendant, J. H. Brader, and the plaintiff appearing by her attorneys, Works & Copping, and the defendant appearing by his attorneys, Downs and Ellis and E. A. Blythe and the court having examined the answer of the defendant with the exhibits thereto attached, and the demurrer of the plaintiff to said answer, and having heard the argument of counsel, is of the opinion that the law is with the plaintiff and that the demurrer to the defendant's answer should be in all things sustained.

It is therefore ordered, adjudged and decreed by the court that

the demurrer of the plaintiff to the answer of the defendant be and the same is hereby sustained to which action and ruling of the court the defendant then and there in open court excepted.

Whereupon the defendant declined to plead further, and elected to stand on the answer as filed.

Whereupon the plaintiff asked for judgment as prayed for in plaintiff's petition for possession of the following described lands to wit:

The N. E. $\frac{1}{4}$ of Section Twenty Seven (27) Township Six (6) South, Range Sixteen (16) East; and N. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of Section Twenty Nine (29) Township Five (5) South, Range Fifteen (15) East of the Indian Base and Meridian, and being two hundred acres of land in Choctaw County, Oklahoma, according to the Government survey thereof, and to quiet the title of the plaintiff to said lands;

And the Court having heard the evidence in support of the allegations of plaintiff's petition:

It is therefore ordered, adjudged and decreed by the Court that the plaintiff is the owner in fee simple and entitled to possession of the premises above described and that she have and recover the possession thereof, and that the title of the plaintiff in and to the above described land be quieted.

And it being further shown to the court that the plaintiff asks for damages for wrongful detention of the above described land by the defendant and for the rental value of same during the time said lands were occupied by the defendant adversely to the plaintiff, and it further appearing to the court that the defendant claims the value of certain improvements placed on said lands by the defendant. The Court directed that the parties introduce testimony in regard to the rental value of said land and the value of the said improvements.

Whereupon both parties announced ready for trial on said matters and a jury being waived, and the court having heard the evidence of the witnesses, and the argument of counsel finds that the rental value of the premises during the time defendant occupied said lands adversely to the plaintiff, was reasonably worth \$250.00 in excess of the value of the improvements placed on said land by the defendant.

It is therefore, ordered, adjudged and decreed by the Court that the plaintiff do have and recover of and from the defendant the said sum of \$250.00, being the excess of the rental value of said lands and premises over the value of all improvements placed thereon by the defendant, and for all costs in this behalf expended for which let execution issue, to which ruling and judgment of the court the defendant in open court excepted and gave notice of appeal, and asked and was given 30 days within which to make and serve case made; plaintiff given ten days within which to suggest amendments; case made to be settled and signed on five days' notice to either party, in writing. Appeal bond herein is fixed at the sum of \$1,500.00 to be approved by the Clerk of this Court. It is further ordered that execution and writ of possession be stayed pending the filing of said bond in 20 days from this date.

(Signed)

A. H. FERGUSON, *Judge*.

Endorsed: Filed November 12, 1912. T. W. Hunter, Clerk. By E. A. Burke, Deputy. (Ent. Journal 5 P. 403.)

33

Order.

STATE OF OKLAHOMA,
Choctaw County:

In the District Court.

RACHEL JAMES, Formerly RACHEL REEVES, Plaintiff,
vs.
J. H. BRADER, Defendant.

Now on this 19th day of November, 1912, it appearing to the said court that the time heretofore granted to defendant herein within which to make and serve a case made and transcript of said proceedings herein has been insufficient by reason of the failure of the Court reporter and the clerk of said court to furnish same due to the press of business.

It is therefore ordered and adjudged that for good cause shown that the same heretofore granted the defendant herein within which to make and serve a case made and transcript of said cause be extended 60 days from this 19th day of November, 1912.

And it is further ordered and adjudged that the plaintiff herein have 10 days thereafter within which to suggest amendments thereto and that the same be settled on five days' notice.

It is further ordered and adjudged that upon defendant giving bond approved by the clerk of this court, the amount heretofore fixed, that execution herein be stayed within the time herein granted for the making and serving of said cause made and transcript.

(Signed)

SUMMERS HARDY,
Judge of the District Court.

Endorsed: Journal Entry. Filed November 19, 1912. T. W. Hunter, Clerk. By E. A. Burke, Deputy.

34

STATE OF OKLAHOMA.

County of Choctaw, ss:

I, T. W. Hunter, Clerk of the District Court of Choctaw County, State of Oklahoma, do hereby certify that the foregoing fourteen (14) typewritten pages annexed hereto contain a full, true and complete copy and transcript of the original record including the petition, preceipe for summons, summons and return thereon, answer of defendant, with exhibits attached thereto, journal entry of judgment, and journal entry of order extending time to make and serve case made, in the case entitled, Rachel James, formerly Rachel Reeves, plaintiff, vs. J. H. Brader, defendant, No. 1069, in the District Court of Choctaw County, State of Oklahoma, as the originals remain on

file and of record in my office in the city of Hugo, Choctaw County, State of Oklahoma.

In testimony whereof, I hereunto set my hand and affix the seal of the said court this 17th day of December, A. D. 1912.

T. W. HUNTER,

*Clerk of the District Court of Choctaw
County, Oklahoma.*

[SEAL.]

By E. A. BURKE, *Deputy.*

35 And thereafter, at the January, 1915, Term, on the 23rd day of February, 1915, the following proceeding was had in said cause, to wit:

#4721.

J. H. BRADER, Plaintiff in Error,

vs.

RACHEL JAMES, Defendant in Error.

And now on this day it is ordered by the court that upon the joint motion filed Feb. 19, 1915, the above cause is advanced and set for oral argument on March 9th 1915.

36 And thereafter, at the January, 1915, Term of said court, on the 9th day of March, 1915, the following proceeding was had in said cause, to wit:

#4721.

J. H. BRADER, Plaintiff in Error,

vs.

RACHEL JAMES, etc., Defendant in Error.

And now on this day the above cause is argued orally and the cause is submitted on the record, briefs and oral argument.

37 And thereafter, at the April, 1915, Term of said Court, on the 18th day of May, 1915, the following proceeding was had in said cause, to wit:

#4721.

J. H. BRADER, Plaintiff in Error,

vs.

RACHEL JAMES, etc., Defendant in Error.

And now this cause comes on for final decision and determination by the court upon the record and briefs filed herein.

And the court having considered the same finds that the judgment of the lower court in the above cause should be affirmed.

It is therefore ordered and adjudged by the court that the judg-

ment of the trial court in the above cause be, and the same is hereby affirmed. Opinion by Sharp, J.

All the Justices concur.

38 Filed May 18, 1915. William M. Franklin, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 4721.

J. H. BRADER, Plaintiff in Error,

v.

RACHEL JAMES, née REEVES, Defendant in Error.

Syllabus.

1. Sec. 22 of the Act of Congress of April 26, 1906 (34 Stat. at L. 137, ch. 1876), giving to the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, authority to sell and convey the lands inherited from such decedent, but which further provides, "All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe," renders void a deed to inherited lands, whether surplus or homestead, allotted during the lifetime of a deceased full-blood Choctaw who died prior to the date of the passage of the act, where the heir, an adult full-blood Choctaw, attempted to convey by deed, subsequent to its passage, without obtaining the approval of the Secretary of the Interior to such conveyance.
2. The title to the lands in controversy being, at the date of the passage of the Act of April 26, 1906, in the defendant in error, any conveyance thereafter made by her was controlled by the law then in force; and as such law provided that a conveyance by a full-blood Indian heir was subject to the approval of the Secretary of the Interior, and such approval not having been secured, the deed was void.
3. Congress, in pursuance of the long established policy of the government, has a right to determine for itself when the guardianship which has been maintained over the Indian shall ceased.
4. Congress may, in the exercise of its lawful authority, impose restrictions on full-blood Indian heirs, requiring that conveyances by them of inherited allotted lands be approved by the Secretary of the Interior; and this, notwithstanding the restrictions imposed by prior legislation have expired by limitation of time or by the death of the allottee.

5. The rights of full-blood Choctaws, who were made citizens of the United States by the Act of March 3, 1901 (31 Stat. at L. 1447, ch. 868), with all the rights, privileges, and immunities of such citizens, were not unconstitutionally impaired by the Act of April 26, 1906, par. 22, imposing restrictions upon the alienation by them of inherited allotted lands, notwithstanding that prior to the passage of the act the lands so inherited, or a part thereof, may have been free of all restrictions.

39 Error from the District Court of Choctaw County.

A. H. Ferguson, Judge.

Action by Rachel James, née Reeves, against J. H. Brader. Judgment for plaintiff, and defendant appeals.
Affirmed.

Downs & Ellis, E. A. Blythe, for plaintiff in error.
Works & Copping, for defendant in error.

Opinion by the Court by

SHARP, J.:

On October 27, 1905, Cerena Wallace, a full-blood Choctaw woman, died, leaving as her sole surviving heir at law, her daughter, Rachel James, née Reeves, the defendant in error. Thereafter and on the 17th day of August 1907, said defendant in error, joined by her husband, Davis James, conveyed by warranty deed, a part of the lands inherited by her from her deceased mother, the lands sold constituting the homestead allotment of 160 acres and 40 acres of the surplus allotment. Thereafter and on the 13th day of September, 1909, the purchaser, Tillie Brader, for the consideration of \$1.00, executed to the plaintiff in error, J. H. Brader, a quit-claim deed to said land. The deed executed by Rachel James and her husband to Tillie Brader, was never approved by the Secretary of the Interior, neither does it appear that it was ever presented to him for approval. On August 28, 1912, Rachel James instituted in the district court of Choctaw County an action at law to recover the possession of said land, and for the use and occupation thereof during the time the same was occupied by defendant, Brader. Trial being had judgment was awarded plaintiff for the possession of the land and for \$250.00, which sum the court found to be the reasonable rental value

40 of the property, after crediting the defendant with the value of all improvements which he had erected thereon.

The record before us fairly presents these questions: (1) could a full-blood Choctaw Indian, on and after the 26th day of April, 1906, and before May 27, 1908, convey the lands inherited by her from her mother, who was a full-blood Choctaw Indian, and which lands had been allotted to her during her life-time, so as to give a good title to the purchaser, without the conveyance being approved by the Secretary of the Interior; (2) if the legislation of Congress

undertook to make such conveyances valid only when approved by the Secretary of the Interior, is it constitutional?

The allotment made to Cereña Wallace was under authority of, and, originally, in the matter of alienation, controlled by secs. 12, 15, and 16, of the Supplemental Agreement with the Choctaws and Chickasaws of July 1, 1902 (32 Stat. at L. 641, ch. 1362). According to sec. 12 of said agreement, it was provided that each member of said tribes should, at the time of the selection of his allotment, designate as a homestead out of said allotment, lands equal in value to 160 acres of the average allottable land of the Choctaw and Chickasaw Nations, as nearly as might be, which should be inalienable during the lifetime of the allottee, not exceeding 21 years from the date of certificate of allotment, and that separate certificate and patent should issue for said homestead. As to the surplus allotment, it was provided by sec. 16 that all the lands allotted to the members of said tribes, except such land as was set aside to each for a homestead, as therein provided, should be alienable after the issuance of patent as follows: one-fourth in acreage in one year, one-fourth in acreage in three years, and the balance in five years; in each case from date of patent: provided, that such land should not be alienable by the allottee or his heirs at any time before the expiration of the

41 Choctaw and Chickasaw tribal governments, for less than its appraised value. In sec. 15 it was provided that lands allotted to members should not be affected or encumbered by any deed, debt or obligation of any character, contracted prior to the time at which said land might be alienated under said act, nor should said land be sold except as therein provided. It will be observed that the homestead lands were inalienable "during lifetime of the allottee, not exceeding 21 years from the date of certificate of allotment." The period of restriction was thus definitely limited, and the clear implication is that when the prescribed period expired, the lands were to become alienable; that is, by the heirs of the allottee upon his death, or by the allottee himself at the end of 21 years. Thus, with respect to homestead lands, the Supplemental Agreement imposed no restriction upon alienation by the heirs of a deceased allottee. This was the view taken in *Mullen et al. v. United States*, 224 U. S. 448, 56 L. Ed. 834, where it was said that where lands were allotted to a living member of the tribe, upon his death the homestead portion thereof descended free of restrictions. When the 40 acres of surplus allotment became alienable, it is impossible to determine from the record before us; neither, as we will presently see, is it important to a determination of the case. Some 16 months prior to the conveyance by Rachel James, Congress passed the Act of April 26, 1906 (34 Stat. at L. p. 137). From this act it appears that Congress had undertaken to make new provisions for the protection of full-blood Indians of the Five Civilized Tribes, and to place them, as to the alienation, disposition, and encumbrance of their lands, under restrictions such as to operate to protect them, and to require the Secretary of the Interior to approve conveyances of certain classes

of Indians, in order that they might part with lands of the character named therein only upon fair remuneration, and when their interests had been sufficiently safe-guarded by competent authority. This intention is clearly expressed in various sections of the act, particularly in sections 19, 21, 22, and 23. While all are important, and bear upon the question of the policy of Congress with regard to full-blood Indians, sec. 22 is the only one with which we are directly concerned. This section provides:

"That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States court for the Indian Territory. And in case of the organization of a State or Territory, then the proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe."

The leading authority, apparently relied upon by both sides, construing this act, is that of *Tiger v. The Western Investment Co.*, 221 U. S. 286, 55 L. Ed. 738. There, however, the act was passed prior to the five year period of restrictions contained in sec. 16 of the Creek Supplemental Agreement of June 30, 1902 (32 Stat. at L. 500, ch. 1323). In all other, if indeed not in all, respects the case furnishes a controlling authority. The same restriction of sec. 22 of the act of 1906, was urged by the defendants in that case as insisted upon by the plaintiff in error here. Construing the act in connection with the subsequent act of May 27, 1908 (35 Stat. at L. 312, ch. 199), it was held to have been the purpose of Congress to require conveyances covered by sec. 22 to be approved by the Secretary of the Interior. It was said that the sections of the

43 Act of April 26, 1906, under consideration, showed a comprehensive system of protection as to full-blood Indians. Various sections of the act concerning different classes of transactions were pointed out, and it was stated that under sec. 19, full-blood Indians were not permitted to alienate, sell, dispose of, or encumber allotted lands within 25 years, unless Congress otherwise provided. That the leasing of their lands, other than homesteads, for more than one year, could be made under rules and regulations prescribed by the Secretary of the Interior. That in case of the inability of a full-blood Indian already owning a homestead, to work or farm the same, the Secretary might authorize the leasing of such homestead. That under sec. 20, leases and rental contracts of full-blood Indians, with certain exceptions, were required to be in writing, subject to the approval of the Secretary of the Interior. That under sec. 23 authority was given to all persons of lawful age and sound mind, to devise

and bequeath all their estates, real and personal, and all interests therein, but that no will of a full-blood Indian, devising real estate, and disinheriting his parent, wife, spouse, or children, should be valid until acknowledged before and approved by a judge of the United States Court in the Territory, or by a United States Commissioner. Particular consideration was then given to sec. 22, which it was said would enable full-blood Indians, as well as others, to convey inherited allotted lands, but that conveyances made under said section by heirs who were full-blood Indians, should be subject to the approval of the Secretary of the Interior. This, it was admitted, would have the effect of extending the requirements of the approval of the Secretary of the Interior as to full-blood Indians beyond the term prescribed in sec. 16 of the act of 1902, and it was said such was the purpose of Congress which, it was stated, was emphasized in paragraph 29 of the act, wherein all previous inconsistent acts

44 and parts of acts were repealed. Answering the contention that it was not intended that Congress should interfere with Indian full-blood heirs in their right to make conveyances after the expiration of the five years named in paragraph 16 of the act of 1902, it was held that had Congress intended not to interfere with full-blood Indians in their right to make conveyances after said time, it would have been easy to have said so, and some reference would probably have been made to the prior legislation. It was further observed that no reference was made to the prior legislation, but that it was broadly enacted that all conveyances of the character named in paragraph 22, made by heirs of full-blood Indians, should be subject to the approval of the Secretary of the Interior. To use the language of the court:

"The contention contended for by the defendants in error places Congress in the attitude of requiring such conveyances to be made with the approval of the Secretary of the Interior for the time between the passages of the act of 1906 and the expiration of the period named in the act of 1902, with unrestricted power thereafter to make such conveyances without such approval. Such construction is inconsistent with subsequent legislation of Congress upon the same subject, and which proceeds upon the theory that, in the understanding of Congress, at least, restrictions still existed so far as the inherited lands of full-blood Indians were concerned."

After reviewing various provisions of the act of May 27, 1908, it was said that the obvious purpose of those provisions was to continue supervision over the right of full-blood Indians to dispose of land by will, and to require conveyances of interests of full-blood Indians in inherited lands to be approved by a competent court, as provided in said latter act, after which conclusion the court further observed:

"We cannot believe that it was the intention of Congress, in view of the legislation which we have quoted, to leave untouched the five year restriction of the Act of 1902, so far as inherited lands of full-blood Indians are concerned, or to permit the same to be conveyed without restriction from the expiration of that five year period until the enactment of the legislation of May 1908."

Attention was then called to the terms of the Enabling Act for the admission of the State of Oklahoma (34 Stat. at L. 267, ch. 3335), after which, upon the question then under consideration, the court concluded:

45 "We agree with the construction contended for by the plaintiff in error, and insisted upon by the government, which has been allowed to be heard in this case, that the act of April 1906, while it permitted inherited lands to be conveyed by full-blood Indians, nevertheless intended to prevent improvident sales by this class of Indians, and made such conveyances valid only when approved by the Secretary of the Interior."

The proviso to sec. 22, if taken literally, can lead to but one conclusion, and that is, as held in the Tiger case, that all deeds of inherited allotted lands, made by full-blood Indians, should be subject to approval by the Secretary of the Interior. Sec. 22 of the act removed all restrictions then existing on the conveyance of inherited allotted land, including full-blood heirs. Upon the latter it conferred the power of alienation, but in doing so imposed for their benefit the requirement already mentioned. Such restrictions on the right of alienation, as ran with or attached to lands inherited by the heirs, were removed, and authority to alienate given—but with the exaction of approval.

Construing the language of the proviso to sec. 9 of the act of May 27, 1908, this court held, in *Marey v. Board of Com'rs.* — Okl. —, 144 Pac. 611, that restrictions upon the alienation there involved were removed only upon compliance with the terms of the proviso requiring the approval of conveyances of full-blood heirs by the county court having jurisdiction of the settlement of the allottee's estate. That such was a necessary condition precedent to the power of the state to subject such lands to taxation, and not having been complied with, all proceedings for the purpose of enforcing collection of taxes on said lands were void.

Congress, as *parens patriæ*, by the section mentioned, vested in the Secretary of the Interior authority to do a ministerial act, namely, to approve this class of conveyances when, we may add, for the benefit of the full-blood heirs. In *Mullen v. United States*, 46 224 U. S. 448, 56 L. Ed. 834, the lands conveyed to the appellants were described as those which had been allotted to Choctaws of the full-blood, deceased; and the conveyances were made by the full-blood heirs prior to April 26, 1906, and prior to which time there was, as we have seen, no restrictions upon the right of alienation of such heirs. In other words, the heirs in the cases involved in that case had authority of law to make the deeds attacked, notwithstanding the fact that they were full-bloods. This, under sec. 22 of the Supplemental Agreement. That attention is called to the fact that the conveyances were made prior to April 26, 1906, is to our minds significant, for if the act of that date is without force as to unrestricted inherited lands of full-bloods, it would not matter when the conveyance was made, if the contention of the plaintiff in error be correct. Our conclusion, then, is, that the proviso or latter clause of sec. 22 of the act of April 26, 1906, means just what it says;

and, if it is to stand, requires that all deeds made by the full-blood heirs of inherited allotted lands, in order to be valid, must be approved by the Secretary of the Interior. This, too, regardless of the fact that Cerena Wallace, the full-blood allottee, died before the passage of the act of April 26, 1906, for it is the law in force at the date of conveyance, and not that of the time of the death of the ancestor, that controls. *McHarry v. Eatman*, 29 Okl. 46, 116 Pac. 935; *Harris v. Gale*, 188 Fed. 712; *United States v. Knight et al.*, 206 Fed. 145, 124 C. C. A. 211; *Stephens v. Smith*, 10 Wall. 321, 19 L. Ed. 933. On the question of the constitutionality of the act, a more serious question is presented. Turning again to the opinion in *Tiger v. The Western Investment Company*, we find that Marchie Tiger, the full-blood Creek heir, had sold and conveyed the allotted lands inherited by him, after the expiration of the five year restriction period. It was held by the court that the rights of

47 the Creek Indians, who were made citizens of the United States by the Act of March 3, 1901 (31 Stat. at L. 1447, ch. 868), with all the rights, privileges and immunities, of such citizens, were not unconstitutionally impaired by the Act of April 26, 1906, paragraph 22, extending the prohibition against the alienation of allotted lands by the allottee or his heirs without the approval of the Secretary of the Interior, created by the Creek Supplemental Agreement of June 30, 1902, beyond the five year limitation therein expressed. In considering this subject we must remember that the Congress of the United States has undertaken from the earliest history of the government to deal with the Indians as a dependent people, and to legislate concerning their property with a view to their protection as such. *Cherokee Nation v. Georgia*, 5 Pet. 1, 17, 8 L. Ed. 25, 31; *Stephens v. Cherokee Nation*, 174 U. S. 445, 484, 43 L. Ed. 1041, 1055; *United States v. Kagama*, 118 U. S. 375, 30 L. Ed. 228; *Lone Wolf v. Hitchcock*, 187 U. S. 565, 47 L. Ed. 306. And, we may say further, that the power of the general government to deal with, control, and protect the property of Indians, where not expressly abandoned, may not fairly be open to controversy. Arising originally out of the necessities of the situation, it now has the support of immemorial legislative and executive usage, and likewise, that of judicial sanction, as evidenced in a long line of decisions of the Supreme Court. This power remains in full force and vigor until its further exercise is deemed unnecessary by those in whom it rests. *Worcester v. Georgia*, 6 Pet. 515, 8 L. Ed. 483; *United States v. Rickett*, 168 U. S. 439, 47 L. Ed. 536; *Wallace v. Adams*, 204 U. S. 420, 51 L. Ed. 550, and cases last cited. On March 2, 1906, by joint resolution Congress extended the tribal existence and government of the Five Civilized Tribes of Indians in the Indian Territory; and in sec. 28 of the very act under

48 which it is provided that the deed of a full-blood Indian heir to inherited lands shall be approved by the Secretary of the Interior, and in less than two months after the passage of the joint resolution, Congress enacted that the tribal existence and the then present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole Nations were continued in full force

and effect for all purposes authorized by law, until otherwise provided by law, with certain enumerated limitations upon the tribal authority. Neither this act or the act of May 27, 1908, evinced an intention on the part of Congress to abandon or terminate the relation of guardianship over those whom it regarded as a dependent people, but on the other hand, manifested a continuance of that relation. Also, in passing the Enabling Act for the admission of the State of Oklahoma, Congress was careful to preserve the authority of the government of the United States over the Indians, their lands and property, which it had prior to the passage of the act (34 Stat. at L. 267, ch. 3335). As to both tribal unallotted lands and annuities, the government retained and yet retains the former control. This is also true in the matter of protecting the Indian in the lands from which restrictions have not been removed. Under such a state of facts it was within the power of Congress, acting as *parens patriæ*, to retain over those of its wards, whom Congress deemed in need of its aid (in this case full-blood Indian heirs), the right of control, by requiring that conveyances made by them of inherited lands be subject to approval. Powers, rights, and interests, of sovereignty are never relinquished by mere lapse of time or by implication. Once rightfully established and asserted, they are presumed to exist, and to continue to exist until abandoned by express terms. This principle applies alike to prerogatives of the executive,

49 powers of the legislative, and the jurisdiction of the courts. *United States v. Knight*, 14 Pet. 301, 10 L. Ed. 465; *United States v. Herron*, 20 Wall. 251, 22 L. Ed. 275. As expressed in *Wheeling & Belmont Bridge Co. v. Wheeling Bridge Co.*, 138 U. S. 237, 34 L. Ed. 967:

"An alleged surrender or suspension of a power of government, respecting any matter of public concern, must be shown by clear and unequivocal language; it cannot be inferred from any inhibitions upon particular officers, or special tribunals, or from any doubtful or uncertain expressions."

Construing sec. 7 of the act of Congress of May 27, 1902 (32 Stat. at L. 275), authorizing the adult heirs of any deceased Indian, to whom allotted lands had been patented, to sell inherited lands subject to the approval of the Secretary of the Interior, and providing that when so approved full title should pass to the purchaser, the same as if a final patent without restrictions on alienation had been issued to the allottee, the Circuit Court of Appeals, in *National Bank of Commerce v. Anderson*, 77 C. C. A. 259, 157 Fed. 90, in holding that the trust attached to the proceeds of the sale said:

"We construe the act as expressing the intention of Congress, not to end the trust, but to permit a change of the form of the trust property. The property being held in trust by the United States for a period which had not yet expired, and which period was subject to extension by the President, the intention to terminate the trust must be found to be clearly expressed in order to warrant us in holding that the trust does not follow the property in its changed form."

There Henry Taylor, the heir, though a citizen of the United States, was an Indian of the Puyallup tribe. He lived his own inde-

pendent life, had severed his tribal relation, and was neither dependent of the government or under official control.

A very able opinion is that of Judge Sanborn in *United States v. Thurston County*, 143 Fed. 287, 74 C. C. A. 425, where, after referring to the fact that the Indian was also a citizen of the United States and of the State of Nebraska, it is in part said:

50 "Their civil and political status, however, does not condition the power, authority, or duty of the United States to exert its powers of government or control their property, to protect them in their rights, to faithfully discharge its legal and moral obligations to them, and to execute every trust with which it is charged for their benefit. *Matter of Heff*, 192 U. S. 488, 509, 49 L. Ed. 848; *Buster v. Wright*, 68 C. C. A. 505, 135 Fed. 947; *Wallace v. Adams*, 74 C. C. A. 540, 143 Fed. 716. They are still members of their tribes and of an inferior and dependent race, of which the Supreme Court has said that 'from their very weakness and helplessness, so largely due to the course of dealing of the Federal government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the executive, and by Congress, and by this court, whenever this question has arisen.' *United States v. Kagama*, 118 U. S. 375, 384, 30 L. Ed. 228."

We cite these two latter cases as authority only upon the question, that Congress has not terminated the relation of trust so uniformly recognized in the past, but has in all its branches of government continued its exercise.

It is for Congress, and not the courts, to determine when and how its relation of guardianship shall be abandoned. As was said in *Tiger v. The Western Investment Co.*, after reviewing many former opinions of that court upon the subject.

"Taking these decisions together, it may be taken as the settled doctrine of this court, that Congress, in pursuance of the long established policy of the government, has a right to determine for itself when the guardianship which has been maintained over the Indian shall cease. It is for that body, and not the courts, to determine when the true interests of the Indian require his release from such condition of tutelage."

Re *Heff*, 197 U. S. 448, 49 L. Ed. 197; *United States v. Celestine*, 215 U. S. 278, 54 L. Ed. 195. As said in the latter case, speaking of the question under consideration:

"It is not within the power of the courts to overrule the judgment of Congress."

Whether the restrictions on alienation as provided in the Supplemental Agreement, under which the lands were allotted, had or had not expired, does not of itself, and while the title remains in the Indian, determine that Congress has renounced its power to legislate in the latter's behalf as a dependent. Upon this question we

51 again quote from the *Tiger* case:

"Upon the matters involved, our conclusions are that Congress has had at all times, and now has the right to pass legislation in the interest of Indians as a dependent people; that there is noth-

ing in citizenship incompatible with this guardianship over the Indian's lands inherited from allottees, as shown in this case; that in the present case when the act of 1906 was passed, Congress had not released its control over the alienation of the lands of full-blood Indians of the Creek Nation; that it was within the power of Congress to continue to restrict alienation by requiring, as to full-blood Indians, the consent of the Secretary of the Interior to a proposed alienation of lands such as are involved in this case; that it rests with Congress to determine when its guardianship shall cease, and while it still continues it has the right to vary its restrictions upon the alienation of the Indian's lands in the promotion of what it deems the best interest of the Indian."

True, in that case, as we have already observed, the restrictions were not removed when the act continuing them was passed. The question of guardianship between the full-blood Indian heir and the general government, however, does not depend upon the fact of alienability of allotted lands, but rests upon the question of his dependency as viewed by Congress.

Not only is this view borne out by the decision in the Tiger case, but the the early case of *Stephens v. Smith*, 10 Wall, 321, 19 L. Ed. 933. There an action of ejectment was brought by Victoria Smith, a half-blood Kansas Indian, to recover from Stephens land sold by her to him, and which had been set apart to her under the treaty of June 3, 1825 (7 Stat. at L. 245). On May 26, 1860, Congress passed an act forbidding future disposition of the lands of reservees, except by the Secretary of the Interior, on the request of the party interested (12 Stat. at L. 21). The deed in question was made by Victoria Smith to Stephens after the passage of the latter act, and without regard to its requirements. The 11th article of the treaty stipulated that the Kansas Nation should never sell, relinquish, or in any manner dispose of the lands therein reserved, to any other nation, person or persons, whatever, without the permission of the United States for that purpose had and obtained. This was the only provision, as we understand, against alienation, and it was said:

"It would seem that the contracting parties intended this prohibition to apply to the individual members of the tribe; however, if it were not so, the policy which dictated the restrictions would be in danger of being defeated altogether."

The opinion of the court was not rested upon this construction of the treaty, for it was said, referring to the article mentioned:

"It is, however, not necessary, for the purposes of this suit, to decide this point, as the deed in question was made after the passage of the act of Congress of the 26th day of May, 1860, it relieves the subject of all difficulty."

It was held that the act vested the title of the United States to the land, which the treaty had set apart for the use of the half-bloods, in the reservees, if living, or if dead, in their heirs, and forbade any future disposition of them, except by the Secretary of the Interior, on the request of the party interested. The court then proceeds:

"It was considered by Congress to be necessary, in case the reservees should be desirous of relinquishing the occupation of their lands,

that some method of disposing of them should be adopted which would be a safeguard against their own improvidences; and the power of Congress to impose a restriction on the right of alienation, in order to accomplish this object, cannot be questioned. Without this power, it is easy to see, there would be no way of preventing the Indians from being wronged in contracts for the sale of their lands, and the history of our country affords abundant proof that it is at all times difficult, by the most careful legislation, to protect their interests against the superior capacity and adroitness of their more civilized neighbors. It was, manifestly, the purpose of Congress, in conferring the authority to sell (on the Secretary of the Interior), to save the lands of the reservees from the cupidity of the white race; and if the provisions of the treaty were not enough for the purpose, the speedy action of Congress was demanded by the rapid settlement of the adjacent territory. In 1825, when the treaty was made, it was not regarded as a probable event that these Indians, owing to the remoteness of the territory to which they were removed, would suffer from the encroachments of our people, but in 1860 the same population that had demanded their removal from the organized communities, followed them to Kansas. In this condition of things Congress acted and the necessity for legislation on the subject, if indeed, there were need for any, is shown by the defense which is interposed to this suit. It appearing, then, that by the treaty

53 and law in force at the date of the deed, Victoria Smith had no capacity to alienate her land, and the authority to sell being vested in the Secretary of the Interior, and there being no evidence that this officer ever authorized the sale, or in any manner consented to it, it follows that the sale was void, and that the deed conveys no title to the purchaser."

We are not unmindful that the Circuit Court of Appeals, in *Bartlett et al. v. United States*, 203 Fed. 410, 121 C. C. A. 520, held that it was not within the power of Congress to reimpose a restriction upon the alienation of land, against which none at the time existed. The *Bartlett* case did not involve the alienation of inherited lands, neither did it involve the relationship between the general government and full-blood Indians. Besides, the act under consideration was that of May 27, 1908, which expressly excluded from its operation the imposition of restrictions removed from land by or under any law enacted prior to its passage. It was upon this ground that the decision was affirmed on appeal to the Supreme Court of the United States, *United States v. Bartlett et al.*, 235 U. S. 72, 59 L. Ed. —. Sec. 9 of the latter act provided:

"That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land; provided, that no conveyance of any interest of any full-blood Indian heir to such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee."

The court, however, had before it for construction sec. 1 of the act continuing restrictions upon the living allottees, to which was at-

tached the proviso already referred to. While it was said by the court, referring to the former section:

"If taken literally, the language which we have quoted from the act of 1908 is doubtless broad enough to impress all allotments of the class described, whether then subject to the original restriction or theretofore freed from it."

The court shows that on account of the proviso, the language is not to be taken literally. Whether this proviso includes inherited lands named in sec. 9 of the act, it is unnecessary to consider, for we are not construing the latter act, but instead, in the respect mentioned, distinguishing it from the former. The period referred to by the court in the Tiger case, namely from August 8, 1907, until May 27, 1908, it will be observed, corresponds with the time between the death of the allottee, Cerena Wallace, in October 1905, and the passage of the Act of April 26, 1906.

In *United States v. Shrock*, 187 Fed. 870, it was said that it was within the power of Congress to impose restrictions upon the alienation of lands of Indian allottees, although restrictions imposed by prior legislation have expired by limitation. In *United States v. Allen*, 179 Fed. 13, 103 C. C. A. 1, it was held that it was within the power of Congress to enlarge the period within which an Indian allottee is prohibited from alienating his land beyond that imposed when the allotment is made, so long as the land is held by the allottee, although in the meanwhile he may have been made a citizen of the United States.

It may be well to note that the act enjoined upon the Secretary of the Interior is in no sense judicial, but on the other hand is purely ministerial. *Jennings v. Wood*, 192 Fed. 507, 112 C. C. A. 657. It follows the making of a bargain between the heir or heirs and the intending purchaser. The Secretary's jurisdiction is invoked only when the conveyance is presented to him for his approval. As was said in the above case:

"His connection with the transaction and his authority first arose after the minds of the contractors came together, and they must have been competent to make the contract submitted for approval. A disapproval was merely a veto."

The rule that the act is ministerial is the same under the act of May 27, 1908, requiring the approval by the county courts of the deed of full-blood heirs. *Tiger v. Creek County Court*, — 55 Okl. —, 146 Pac. 912; *Bartlett v. Okla. Oil Co. et al.*, 218 Fed. 380.

From what has been said, and upon the authority of the decisions herein cited, other than the Bartlett case, we are of the opinion that Congress, in the passage of the Act of April 26, 1906, acted within the scope of its lawful authority; and that the deed from Rachel James to the plaintiff in error, not having the approval of the Secretary of the Interior, was void.

It follows that the judgment of the lower court should be and is affirmed.

Petition for Rehearing.

In the Supreme Court of the State of Oklahoma.

Case No. 4721.

J. H. BRADER, Plaintiff in Error,

vs.

RACHEL JAMES, Formerly RACHEL REEVES, Defendant in Error.

Comes now the said J. H. Brader, plaintiff in error, and respectfully represents to the court that on the 18th day of May, 1915, the court rendered its judgment and decree in the above entitled and numbered cause affirming the judgment of the district court of Choctaw county, Oklahoma, in which this court held, that although the land in controversy was the Homestead allotment of the full blood Choctaw Indian, allotted and patented to her during her lifetime, prior to the act of Congress of April 26th, 1906, and inherited by the defendant in error prior to said act of Congress in 1906, that the conveyance in controversy made thereafter in 1907 was void for the reason that said sale was not approved by the Secretary of the Interior.

First. That said judgment and decree of the court overlooks the main contention of the plaintiff in error, and the one upon which he has chiefly relied for a reversal of the lower court, to wit:

A. That the case of *Tiger vs. Western Investment Company*, supra, is not in point as an authority in this case.

Second. That Section 22 of said Act of Congress of 1906 is in substance interdependent, that the plain object sought by first part of said section was to allow the Indians enumerated therein permission to sell inherited lands; that the second part, or the qualifying clause or proviso expressly limited the subject matter of said approval

57 to only such cases as fairly fell within the purview of the said enacting sentence, and that the use of the word- in said proviso of "all conveyances made under this provision", specifically limited said subject matter for said approval to exactly the subject for which the permission to sell was inserted, and therefore the one question of primary and of almost singular importance is the object sought by Congress in the enacting sentence of said section 22. In this connection the Court has overlooked the argument of the plaintiff in error, that said enacting sentence giving said Indians the power to sell does not apply to or affect lands allotted under the provisions of section 22 of the Supplemental Agreement between the Choctaw and Chickasaw Indians and the United States for the reason that such lands were free from all restrictions against alienation at the instance of their selection in allotment by an administrator, nor giving said enacting sentence a reasonable construction according to its plain intent would it apply to or affect lands upon which all restrictions had been removed by the Secretary of the Interior prior to the passage of the former act, nor would it be possible

to give said section a reasonable construction according to its plain meaning and intent and to say that the permission to sell was enacted to give an Indian the power to sell inherited lands which were held by him free from all restrictions at the date the act went into effect as is the case with the Homestead under consideration.

Third. The Court has further overlooked the concluding contention of the defendant in error under this heading that said second or last sentence expressly provides and limits the requirement of the approval (to quote the language of the same) to, "All conveyances made under this provision", and for this reason does not extend the requirements for said approval to any conveyances except as to such conveyances as are authorized to be made, or which expressly limits the requirement for said approval to such sales only as are fairly embraced within the intentions of said enacting sentence, that

58 such was the holding in the Tiger case, *supra*, which held that because the land considered in that case were restricted at the date the act went into effect, their alienation therefore fell clearly within the meaning and spirit of said first clause, and that said proviso therefore took its effect, and the requirement for its approval was necessary, and that the expression in the last sentence of, "All conveyances", the connection "Under this provision" having been established was sufficiently broad to extend the requirement for an approval beyond the original five year restriction created by the Creek Supplemental treaty.

Fourth. That the court further overlooked that the act of May 27th, 1908, *supra*, is an act of Congress in *para materia* with the act of 1906 under consideration, and that section 22 of the latter act and section 9 of the former relate to and cover the same objects and are only two years separated from each other, and that evidently the alteration of section 22 by section 9 of the latter act was to meet the changes brought about by the admission of Oklahoma to Statehood, and that although said proviso of section 9 of the latter act is broad enough in its language to be independent legislation and require an approval by the court of all sales of all lands passing by descent to all full blood Indians is yet accompanied with the provision, "That nothing contained in this act shall be construed to reimpose restrictions removed under any previous act of Congress," and clearly shows that in the understanding of Congress at least the act of 1906 had not reimposed restrictions which had terminated unless the contention should appear sound that Congress had only attempted to cover and exempt from the reimposition of restrictions such lands as escaped between 1906 and 1908.

Fifth. The court has further overlooked the fact that the contention of plaintiff in error is wholly consistent with the ruling in
59 the Tiger case, it is also in conformity with the opinion of the Secretary of the Interior and the United States Attorney General in which they held, (See page — of original brief filed by plaintiff in error) in a case arising exactly as this one that said section 22 did not have the effect of requiring an approval. That the department had refused to make approvals of such sales after said act, of Homestead lands by full blood heirs for the reason that the

section did not require it, that this ruling by the department would not be overruled even by the United States Supreme Court except for grave reasons and upon a clear showing that said department had construed the law erroneously, citing U. S. vs. Hill, 30 Law ed. of U. S. Reports 627 U. S. vs. Johnson 124 U. S. 236 or 31 Law Ed. 389.

Wherefore, plaintiff in error prays the court that rehearing of said cause be granted by the court in this action, that justice may be done upon a full consideration of the case.

DOWNES AND ELLIS AND
E. A. BLYTHE,
Att'ys for Plaintiff in Error.

Endorsed: 4721—June 1, 1915. The Clerk will stay the mandate. John B. Turner, Justice. Filed Jun- 1, 1915. William M. Franklin, Clerk.

60 And thereafter at the April, 1915, Term of said Court, on the 1st day of June, 1915, the following proceeding was had in said cause, to wit:

#4721.

J. H. BRADER, Plaintiff in Error,
vs.
RACHEL JAMES, etc., Defendant in Error.

And now on this June 1 1915, it is ordered by the court that the mandate of this court in the above cause be stayed.

61 And thereafter, at the April, 1915, Term of said court, on the 29th day of June, 1915, the following proceeding was had in said cause, to wit:

#4721.

J. H. BRADER
vs.
RACHEL JAMES.

And now on this day, June 29, 1915, it is ordered by the court that H. A. Ledbetter be allowed 5 days in which to file brief on petition for rehearing.

62 And thereafter, at the July, 1915, Term of said Court, on the 14th day of September, 1915, the following proceeding was had in said cause, to wit:

#4721.

J. H. BRADER
vs.
RACHEL JAMES.

And now on this day it is ordered by the court that C. C. Herndon be allowed 15 days from date in which to file amicus curiæ brief in support of the opinion of the court.

63 And thereafter, at the July, 1915, Term of said Court, on the 28th day of September, 1915, the following proceeding was had in said cause, to wit:

#4721.

J. H. BRADER
vs.
RACHEL JAMES.

Now, on this 28th day of September, 1915, it is ordered by the undersigned Justice of this court, sitting in chambers, that C. C. Herndon, Esq., have an extension of time until Saturday, October 2, 1915 within which to file a brief as amicus curiæ in support of the decision heretofore rendered in this case.

J. F. SHARP,
Justice of Supreme Court of Oklahoma.

64 And thereafter, at the January, 1916, Term of said Court, on the 11th day of January, 1916, the following proceeding was had in said cause, to wit:

#4721.

J. H. BRADER
vs.
RACHEL JAMES, etc.

And now this cause comes on for final decision and determination by the court upon the record and briefs filed herein.

And the court having considered the same finds that the judgment of the lower court in the above cause should be affirmed.

It is therefore ordered and adjudged by the court that the judgment of the lower court in the above cause be, and the same is hereby affirmed. Opinion by Sharp, J.

All the Justices concur except Hardy, J., dissenting.

65 Filed Jan. 11, 1916. William M. Franklin, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 4721.

J. H. BRADER, Plaintiff in Error,

vs.

RACHEL JAMES née REEVES, Defendant in Error.

Syllabus.

1. Sec. 22 of the Act of Congress of April 26, 1906 (34 Stat. at L. 137, ch. 1876) giving to the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, authority to sell and convey the lands inherited from such decedent, but which further provides, "All conveyances made under this provision by heirs who are full blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe", renders void a deed to inherited lands, whether surplus or homestead, allotted during the lifetime of a deceased full blood Choctaw who died prior to the date of the passage of the act, where the heir, an adult full blood Choctaw, attempted to convey by deed, on August 17, 1907, without obtaining the approval of the Secretary of the Interior to such conveyance.
2. The title to the lands in controversy being, at the date of the passage of the Act of April 26, 1906, in the defendant in error, any conveyance thereafter made by her was controlled by the law then in force; and as such law provided that a conveyance by a full blood Indian heir was subject to the approval of the Secretary of the Interior, and such approval not having been secured, the deed was void.
3. Congress, in pursuance of the long established policy of the Government, has a right to determine for itself when the guardianship which has been maintained over the Indian shall cease.
4. Congress, in the exercise of its Constitutional authority, and while the guardianship relation over full blood Indians continues may impose restrictions on full blood Indian heirs, requiring that conveyances by them of inherited allotted lands be approved by the Secretary of the Interior; and this, notwithstanding the restrictions imposed by prior legislation have expired by limitation, or by the death of the allottee.
5. The Acts of Congress of July 1, 1902, (32 Stat. at L. 641, ch. 834) April 26, 1906 (34 Stat. at L. 137); June 16, 1906 (34 Stat. at L. 267, ch. 3335) and May 27, 1908 (35 Stat. at L.

312, ch. 199) pertaining to the affairs of the Chickasaw and Choctaw Indians, and the Enabling Act, evince no intention on the part of the United States to discontinue or surrender, but on the contrary to continue its relation of guardianship over full blood Choctaw and Chickasaw Indians, in respect to the alienation by them of inherited allotted lands.

66

6. The rights of full blood Choctaws, who were made citizens of the United States by the Act of March 3, 1901 (31 Stat. at L. 1447, ch. 868) with all the rights, privileges, and immunities of such citizens, were not unconstitutionally impaired by the Act of April 26, 1906, Par. 22, imposing restrictions upon the alienation by them of inherited allotted lands, notwithstanding that prior to the passage of the act the lands so inherited, or a part thereof, may have been free of all restrictions.

Error from the District Court of Choctaw County.

A. H. Ferguson, Judge.

Affirmed.

Action by Rachel James, née Reeves, against J. H. Brader. Judgment for plaintiff and defendant appeals.

Downs & Ellis, E. A. Blythe for plaintiff in error.

Works & Copping, for defendant in error.

C. C. Herndon, Tibbetts & Green, H. A. Ledbetter, Joseph P. Rossiter, J. C. Wright, E. E. Hood, Amici Curiae.

Opinion of the Court by

SHARP, J.:

On October 27, 1905, Cerena Wallace, a full blood Choctaw Indian, died, leaving as her sole surviving heir at law, her daughter, Rachel James, née Reeves, the defendant in error. Thereafter and on the 17th day of August, 1907, said defendant in error, a full blood Choctaw, joined by her husband, Davis James, attempted to convey by warranty deed, a part of the lands inherited by her from her deceased mother, the lands sold constituting the homestead allotment of 160 and 40 acres of the surplus allotment. On the 13th day of September, 1909, the purchaser, Tillie Brader, for the consideration of \$1.00, executed to the plaintiff in error, J. H. Brader, a quit-claim deed to said land. The deed executed by Rachel

67 James and her husband to Tillie Brader, was never approved by the Secretary of the Interior, neither does it appear that it was ever presented for approval. On August 28, 1912, Rachel James instituted in the district court of Choctaw County an action at law to recover the possession of said land, and for the use and occupation thereof during the time the same was occupied by defendant, Brader. Trial being had, judgment was awarded plaintiff for

the possession of the land and for \$250.00 which sum the court found to be the reasonable rental value of the property, after crediting the defendant with the value of all improvements which he had erected thereon.

The record before us fairly presents these questions: (1) could Rachel James, a full blood Choctaw Indian, on and after the 26th day of April, 1906, and before May 27, 1908, convey the lands inherited by her from her mother, who was a full blood Choctaw Indian, and which lands had been allotted to her during her lifetime, so as to give a good title to the purchaser, without the conveyance being approved by the Secretary of the Interior; (2) if the legislation of Congress undertook to make such conveyances valid only when approved by the Secretary of the Interior, is it constitutional?

The allotment made to Cerena Wallace was under authority of, and, originally, in the matter of alienation, controlled by, secs. 12, 15 and 16, of the Supplemental Agreement with the Choctaws and Chickasaws of July 1, 1902 (32 Stat. at L. 641, ch. 1362). According to sec. 12 of said agreement, it was provided that each member of said tribes should, at the time of the selection of his allotment, designate as a homestead out of said allotment, lands equal in value to 160 acres of the average allottable land of the Choctaw and Chickasaw Nations, as nearly as might be, which should be inalienable during the lifetime of the allottee, not exceeding 21 years from the date of certificate of allotment, and that separate certificate and

68 patent should issue for said homestead. As to the surplus allotment, it was provided by sec. 16 that all the lands allotted to the members of said tribes, except such land as was set aside to each for a homestead, as therein provided, should be alienable after the issuance of patent as follows: One-fourth in acreage in one year, one-fourth in acreage in three years; and the balance in five years; in each case from date of patent; provided, that such land should not be alienable by the allottee or his heirs at any time before the expiration of the Choctaw and Chickasaw tribal governments, for less than its appraised value. In sec. 15 it was provided that lands allotted to members should not be affected or encumbered by any deed, debt or obligation of any character, contracted prior to the time at which said land might be alienated under said act, nor should said land be sold except as therein provided. It will be observed that the homestead lands were inalienable "during the life-time of the allottee, not exceeding 21 years from the date of certificate of allotment." The period of restriction was thus definitely limited, and the clear implication is that when the prescribed period expired, the lands were to become alienable; that is, by the heirs of the allottee upon his death, or by the allottee himself at the end of 21 years. Thus, with respect to homestead lands, the Supplemental Agreement imposed no restriction upon alienation by the heirs of a deceased allottee. This was the view taken in *Mullen et al. v. United States*, 224 U. S. 448, 56 L. ed. 834, where it was said that where lands were allotted to a living member of the tribe, upon his death the homestead portion thereof descended free of restrictions. When the 40 acres of surplus allotment became alienable, it

is impossible to determine from the record; neither, as we shall presently see, is it important to a determination of the case. Some 16 months prior to the conveyance by Rachel James, Congress passed the Act of April 26, 1906 (34 Stat. at L. p. 137). From this act it appears that Congress had undertaken to make new provisions

69 Tribes, and to place them, as to the alienation, disposition, and encumbrance of their lands, under restrictions such as to operate to protect them, and to require the Secretary of the Interior to approve conveyances of certain classes of Indians, in order that they might part with lands of the character named therein only upon fair remuneration, and when their interests had been sufficiently safe-guarded by competent authority. This intention is clearly expressed in various sections of the act, particularly in sections 19, 21, 22 and 23. While all are important, and bear upon the question of the policy of Congress with regard to full-blood Indians, sec. 22 is the only one with which we are directly concerned. This section provides:

"That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe, to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States court for the Indian Territory. And in the case of the organization of a State or Territory, then the proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe."

The leading authority, apparently relied upon by both sides, construing this act, is that of *Tiger v. The Western Investment Co.*, 221 U. S. 226, 55 L. Ed. 738. There, however, the act was passed prior to the expiration of the five year period of restrictions contained in sec. 16 of the Creek Supplemental Agreement of June 30, 1902 (32 Stat. at L. 500, ch. 1323). In all other, if indeed not in all, respects, the case furnishes a controlling authority. The same construction of sec. 22 of the act of 1906 was urged by the defendants in that case as is insisted upon by the plaintiff in error here. Construing the act in connection with the subsequent Act of May 27,

1908 (35 Stat. at L. 312, ch. 199), it was held to have been 70 the purpose of Congress to require conveyances provided by sec. 22 to be approved by the Secretary of the Interior. It was said that the sections of the Act of April 26, 1906, under consideration showed a comprehensive system of protection as to full blood Indians. Various sections of the act concerning different classes of transactions were pointed out, and it was stated that under sec. 19, full blood Indians were not permitted to alienate, sell, dis-

pose of, or encumber allotted lands within 25 years, unless Congress otherwise provided. That the leasing of their lands, other than homesteads, for more than one year, could be made under rules and regulations prescribed by the Secretary of the Interior. That in case of the inability of a full blood Indian already owning a homestead, to work or farm the same, the Secretary might authorize the leasing of such homestead. That under sec. 20, leases and rental contracts of full blood Indians, with certain exceptions, were required to be in writing, subject to the approval of the Secretary of the Interior. That under sec. 23 authority was given to all persons of lawful age and sound mind, to devise and bequeath all their estates, real and personal, and all interests therein, but that no will of a full blood Indian, devising real estate, and disinheriting his parent, wife, spouse, or children, should be valid until acknowledged before and approved by a judge of the United States Court for the Indian Territory, or by a United States Commissioner. Particular consideration was then given to sec. 22, which it was said would enable full blood Indians, as well as others, to convey inherited allotted lands, but that conveyances made under said section by heirs who were full blood Indians, should be subject to the approval of the Secretary of the Interior. This, it was admitted, would have the effect of extending the requirements of the approval of the Secretary of the Interior as to full blood Indians beyond the term prescribed in sec. 16 of the act of 1902, and it was said such was the purpose of Congress, which, it was stated, was emphasized in paragraph 29 of the act, wherein all previous inconsistent acts and parts of acts were repealed. Answering the contention that it was not intended Congress should interfere with Indian full blood heirs in their right to make conveyances after the expiration of the five years named in paragraph 16 of the act of 1902, it was said that had Congress intended not to interfere with full blood Indians in their rights to make conveyances after said time, it would have been easy to have said so, and some references would probably have been made to the prior legislation. It was further observed that no reference was made to the prior legislation, but that it was broadly enacted that all conveyances of the character named in paragraph 22, made by heirs of full blood Indians, should be subject to the approval of the Secretary of the Interior. To use the language of the court:

"The contention contended for by the defendant in error places Congress in the attitude of requiring such conveyances to be made with the approval of the Secretary of the Interior for the time between the passage of the act of 1906 and the expiration of the period named in the act of 1902, with unrestricted power thereafter to make such conveyances without such approval. Such construction is inconsistent with subsequent legislation of Congress upon the same subject, and which proceeds upon the theory that, in the understanding of Congress, at least, restrictions still existed so far as the inherited lands of full blood Indians were concerned."

After reviewing various provisions of the Act of May 27, 1908, it was said that the obvious purpose of those provisions was to con-

tinue supervision over the right of full blood Indians to dispose of land by will, and to require conveyances of interest of full blood Indians in inherited lands to be approved by a competent court, as provided in said latter act, after which conclusion the court further observed:

"We cannot believe that it was the intention of Congress, in view of the legislation which we have quoted, to leave untouched the five year restriction of the Act of 1902, so far as inherited lands of full blood Indians are concerned, or to permit the same to be conveyed without restriction from the expiration of that five year period until the enactment of the legislation of May 1908."

Attention was then called to the terms of the Enabling Act for the admission of the State of Oklahoma (34 Stat. at L. 267, ch. 3335), after which, upon the question then under consideration, the court concluded:

"We agree with the construction contended for by the plaintiff in error, and insisted upon by the government, which has been allowed to be heard in this case, that the act of April, 1906, while it permitted inherited lands to be conveyed by full blood Indians, nevertheless intended to prevent improvident sales by this class of Indians, and made such conveyances valid only when approved by the Secretary of the Interior."

The proviso to sec. 22, if taken literally, can lead to but one conclusion, and that is: all deeds to inherited allotted lands, made by full blood Indian heirs, after the passage of the act, are subject to the approval of the Secretary of the Interior. Said section conferred upon heirs the right to sell and convey inherited lands, but of full blood Indian heirs it was required that all conveyances made by them should be subject to the approval of the Secretary of the Interior, under such rules and regulations as that officer might prescribe. In other words, the right of alienation was given upon the condition, in the case of full blood Indian heirs, that the Secretary of the Interior should be satisfied with and approve the conveyance made; the obvious object of the provision being one of protection to the Indian.

Nor is there anything in the language used, or in the history of the times, to indicate a purpose to confine the operation of the statute, to sales and conveyances made by full blood heirs to lands thereafter inherited and to exclude lands inherited, but not conveyed, prior to its adoption. The one class needed protection as much as the other, and each are equally within the statute, fairly construed.

In *Mullen v. United States*, 224 U. S. 448, 56 L. ed. 834, the lands conveyed to the appellants were described as those which had been allotted to Choctaws of the full blood, deceased; and the conveyances were made by the full blood heirs prior to April 26, 1906, and prior to which time there was, as we have seen, no restrictions upon

the right of alienation of such heirs. In other words, the heirs in that case had authority of law to make the deeds attacked, notwithstanding the fact that they were full bloods. This, under sec. 22 of the Supplemental Agreement. That atten-

tion is called to the fact that the conveyances were made prior to April 26, 1906, is to our minds significant, for if the act of that date is without force as to unrestricted inherited lands of full bloods, it would not matter when the conveyance was made, if the contention of the plaintiff in error be correct. Our conclusion, then, is that the proviso or latter clause of sec. 22 of the Act of April 26, 1906, means just what it says; and requires that all deeds made by full blood Indian heirs of inherited allotted lands, since the passage of the act, in order to be valid, must be approved by the Secretary of the Interior. This, too, regardless of the fact that Cerena Wallace, the full blood allottee, died before the passage of the Act of April 26, 1906, for it is the law in force at the date of conveyance, and not that of the time of the death of the ancestor, that controls. *McHarry v. Eatman*, 29 Okl. 46, 116 Pac. 935; *Harris v. Gale*, 186 Fed. 712; *United States v. Knight, et al.*, 203 Fed. 145, 124 C. C. A. 211; *Stephens v. Smith*, 10 Wall. 321, 19 L. ed. 933. Passing to the question of the constitutionality of the act, we refer again to the opinion in *Tiger v. The Western Investment Company*. There *Marchie Tiger*, the full blood Creek heir, had sold and conveyed the allotted lands inherited by him, after the expiration of the five year restriction period. It was held by the court that the rights of the Creek Indians, who were made citizens of the United States by the Act of March 3, 1901 (31 Stat. at L. 1447, ch. 868), with all the rights, privileges and immunities, of such citizens, were not unconstitutionally impaired by the Act of April 26, 1906, paragraph 22, extending the prohibition against the alienation of allotted lands by the allottee or his heirs without the approval of the Secretary of the Interior, created by the Creek Supplemental Agreement

74 of June 30, 1902, beyond the five year limitation therein named. In considering this subject we must remember that the Congress of the United States has undertaken from the earliest history of the government to deal with the Indians as a dependent people, and to legislate concerning their property with a view to their protection as such dependents. *Cherokee Nation v. Georgia*, 5 Pet. 1, 17, 8 L. ed. 25, 31; *Stephens v. Cherokee Nation*, 174 U. S. 445, 484, 43 L. ed. 1041, 1055; *United States vs. Kagama*, 118 U. S. 375, 30 L. ed. 228; *Lone Wolf v. Hitchcock*, 187 U. S. 565, 47 L. ed. 306. And, we may say further, that the power of the general government to deal with, control, and protect the property of Indians, where not expressly abandoned, may not fairly be open to controversy. Arising originally out of the necessities of the situation, it now has the support of immemorial legislative and executive usage, and likewise, that of judicial sanction, as evidenced in a long line of decisions of the Supreme Court. This power remains in full force and vigor until its further exercise is deemed unnecessary by those in whom it rests. *Worcester v. Georgia*, 6 Pet. 515, 8 L. ed. 483; *United States vs. Rickert*, 168 U. S. 439, 47 L. ed. 536; *Wallace v. Adams*, 204 U. S. 420, 51 L. ed. 550, and cases last cited. On March 2, 1906, by joint resolution Congress extended the tribal existence and government of the Five Civilized Tribes of Indians in the Indian Territory; and in sec. 28 of the very act under which it

is provided that the deed of a full blood Indian heir to inherited lands shall be approved by the Secretary of the Interior, and in less than two months after the passage of the joint resolution, Congress enacted that the tribal existence and the then present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole Nations were continued in full force and effect for all purposes authorized by law, until otherwise provided by law, with certain enumerated limitations upon the tribal authority. Neither this act

75 or the Act of May 27, 1908, evinced an intention on the part of Congress to abandon or terminate the relation of guardianship over those whom it regarded as a dependent people, but on the other hand, manifested a purpose to continue that relation. Also, in passing the Enabling Act for the admission of the State of Oklahoma, Congress was careful to preserve the authority of the government of the United States over the Indians, their lands, property or other rights, which it had prior to the passage of the act, (34 Stat. at L. 267, ch. 3335.) Ex parte Webb, 225 U. S. 663, 56 L. ed. 1248. As to both tribal unallotted lands and annuities, and otherwise, the government retained and yet retains the former control. This is also true in the matter of protecting the Indian in the lands from which restrictions have not been removed. Such was the conclusion of the Supreme Court in *Heckman v. United States*, 224 U. S. 413, 56 L. ed. 820, 829, where it is said by Mr. Justice Hughes:

"The placing of restrictions upon the right of alienation was an essential part of the plan of individual allotment; and limitations were imposed by each of the allotment agreements. The separate statutes were supplemented by the general acts of 1906 and 1908, already mentioned. These restrictions evinced the continuance, to this extent, at least, of the guardianship which the United States had exercised from the beginning. That the conferring of citizenship was in nowise inconsistent with the retention of control over the disposition of the allotted lands was expressly decided in the case of *Tiger v. Western Inv. Co.*", etc. See also, *Wiggan v. Connolly*, 163 U. S. 56, 41 L. ed. 69; *Perrin v. United States*, 232 U. S. 478, 58 L. ed. 691; *Bowling v. United States*, 233 U. S. 528, 58 L. ed. 1080; *Jefferson v. Winkler*, 26 Okl. 653, 110 Pac. 755; *Texas Co. v. Henry*, 34 Okl. 342, 126 Pac. 224.

Powers, rights, and interests of sovereignty are never relinquished by mere lapse of time or by implication. Once rightfully established and asserted, they are presumed to exist, and to continue to exist until abandoned by express terms. This principle applies alike to prerogatives of the executive, powers of the legislature, and the jurisdiction of the courts. *United States v. Knight*, 14 Pet. 301,

76 10 L. ed. 465; *United States v. Herron*, 20 Wall. 251, 22 L. ed. 275. As expressed in *Wheeling & Belmont Bridge Co. v. Wheeling Bridge Co.*, 138 U. S. 237, 34 L. ed. 967:

"An alleged surrender or suspension of a power of government, respecting any matter of public concern, must be shown by clear and unequivocal language; it cannot be inferred from any inhibitions

upon particular officers, or special tribunals, or from any doubtful or uncertain expressions."

Construing sec. 7 of the Act of Congress of May 27, 1902 (32 Stat. at L. 275), authorizing the adult heirs of any deceased Indian, to whom allotted lands had been patented, to sell inherited lands subject to the approval of the Secretary of the Interior, and providing that when so approved full title should pass to the purchaser, the same as if a final patent without restrictions on alienation had been issued to the allottee, the Circuit Court of Appeals, in *National Bank of Commerce v. Anderson*, 277 C. C. A. 259, 157 Fed. 90, in holding that the trust attached to the proceeds of the sale, said:

"We construe the act as expressing the intention of Congress, not to end the trust, but to permit a change of the form of the trust property. The property being held in trust by the United States for a period which had not yet expired, and which period was subject to extension by the President, the intention to terminate the trust must be found to be clearly expressed in order to warrant us in holding that the trust does not follow the property in its changed form."

There Henry Taylor, the heir, though a citizen of the United States, was an Indian of the Puyallup tribe. He lived his own independent life, had severed his tribal relation, and was neither dependent of the government or under official control.

A very able opinion is that of Judge Sanborn in *United States v. Thurston County*, 143 Fed. 287, 74 C. C. A. 425, where after referring to the fact that the Indian was also a citizen of the United States and of the State of Nebraska, it is said:

"Their civil and political status, however, does not condition the power, authority, or duty of the United States to exert its powers of government or control their property, to protect them in their rights, to faithfully discharge its legal and moral obligations to them, and to execute every trust with which it is charged for their benefit. *Matter of Heff*, 192 U. S. 488, 509, 49 L. ed. 848; *Buster v. Wright*, 68 C. C. A. 505, 135 Fed. 947; *Wallace v. Adams*, 74 C. C. A. 540, 143 Fed. 716. They are still members of their tribes and of an inferior and dependent race, of which the Supreme Court has

77 said that 'from their very weakness and helplessness, so largely due to the course of dealing of the Federal government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the executive, and by Congress, and by this court, whenever this question has arisen.' *United States v. Kagama*, 118 U. S. 375, 384, 30 L. ed. 228."

We cite these two latter cases as authority upon the question, that Congress has not terminated the relation of trust, but has on the other hand zealously continued its exercises.

It is for Congress, and not the courts, to determine when and how the relation of guardianship shall be abandoned. As was said in *Tiger v. The Western Investment Co.*, after reviewing many former opinions of that court upon the subject:

"Taking these decisions together, it may be, taken as the settled doctrine of this court, that Congress, in pursuance of the long estab-

lished policy of the government has a right to determine for itself when the guardianship which has been maintained over the Indian shall cease. It is for that body, and not the courts, to determine when the true interests of the Indian require his release from such condition of tutelage."

Also, as said in *United States v. Celestine*, 215 U. S. 278, 54 L. ed. 195, speaking to the question under consideration:

"It is not within the power of the courts to overrule the judgment of Congress."

Whether the restrictions on alienation as provided in the Supplemental Agreement, under which the lands were allotted, had or had not expired, does not of itself, and while the title remains in the Indian, determine that Congress has renounced its power to legislate in the latter's behalf as a dependent. Upon this question we again quote from the *Tiger* case:

"Upon the matters involved, our conclusions are that Congress has had at all times, and now has the right to pass legislation in the interest of Indians as a dependent people; that there is nothing in citizenship incompatible with this guardianship over the Indian's lands inherited from allottees, as shown in this case; that in the present case when the act of 1906 was passed, Congress had not released its control over the alienation of the lands of full blood Indians of the Creek Nation; that it was within the power of Congress to continue to restrict alienation by requiring, as to full blood Indians, the consent of the Secretary of the Interior to a proposed alienation of lands such as are involved in this case; that it rests with Congress to determine when its guardianship shall cease, and while it still continues it has the right to vary its restrictions upon the alienation of the Indian's lands in the promotion of what it deems the best interest of the Indian."

78 The relation of guardianship between Rachel James and the general government did not depend upon whether the lands inherited by her were alienable at the time descent was cast. Neither was the power of Congress to impose restrictions made to rest upon there being restrictions in force at the time of the passage of the act. It is because of the relation of guardianship that at the time existed between the general government and Rachel James, that Congress had the power to impose restrictions on her right to convey lands inherited by her. As was said in *Heckman v. United States*, *supra*:

"During the continuance of this guardianship the right and duty of the nation to enforce by all appropriate means the restrictions designed for the security of the Indians cannot be gainsaid. While relating to the welfare of the Indians, the maintenance of the limitations which Congress has prescribed as a part of its plan of distribution is distinctly an interest of the United States. A review of its dealings with the tribe permits of no other conclusion. Out of its peculiar relation to these dependent people sprang obligations to the fulfillment of which the national honor has been committed."

Until this guardianship had been unequivocally renounced, Congress could, in its wisdom, continue the exercise of its judgment in

respect to the rights and privileges that should be accorded those of her class. The relationship being the source from which the power is derived, the imposition during its continuance of a new restriction stands upon the same ground as the extension of one yet in force. In other words, the existence of the right of guardianship cannot be made to depend upon the existence of a restriction on a particular piece of land. If the relations of the Indian to the government were, in every respect, save for the bare existence of a restriction upon his title, the same as those of a non-citizen white man, the restriction could not be Constitutionally enlarged without the Indian's consent, because being *sui juris* himself, his power to dispose of his allotment would be absolutely measured by the terms of his deed, and any attempt to vary those terms would be a clear invasion of his property rights. But it would be absurd to say that the authority to vary a restriction is conferred by a restriction. If, therefore, the power is not to be derived from the restriction itself, but must come from the relation of guardianship, of which the restriction is merely one evidence, it must follow that the existence of the restriction is wholly immaterial to the exercise of the power. The power that is correlative to the duty of protection must be such as is adequate to the occasion. If, while an Indian remains a ward of the nation, Congress should make a gross mistake in giving him full control over property essential to his welfare, but which he is not fitted to protect, Congress, acting for him, and with a view to his protection, may correct the mistake, for, as already seen, the power of Congress is not alone dependent upon legislation being had while a limitation remains in effect. The guardianship is of the person as well as of the property. Hence the right to deal with the Indian liquor problem; the right to educate the Indians; to sell their unallotted lands, and keep and pay out per capita the moneys derived therefrom, at will; to appoint probate attorneys; and generally to superintend, counsel, and guide them in their personal affairs. It is the government's peculiar function and duty to afford him protection. This he needs in respect of all his property. Congress, whenever it chooses, may renounce its control and its protective care over the individual. Until that is done, it is safe to assume that there is a reason for continuing the relation; that the Indian is not ready for complete liberation from restraint, and that whatever liberties or disposition over his property are allowed him from time to time, are in the way of experiments, subject to recall if found hasty and ill-advised. The restriction upon alienation is but one mode of exercising the general protective power over those Indians whom Congress may regard as dependent. The power to impose a restriction is entirely consistent with the possession by the individual Indian of rights which are constitutionally protected from interference by Congress. He may not be arbitrarily deprived of property, but the protection of his property is a legitimate and necessary exercise of the power of guardianship, subject to which his property is held; and the imposition of restraint upon his liberty of disposition is a necessary and legitimate means of protecting his property.

Not only is this view borne out by the decision in the *Tiger* case, but in the early case of *Stephens v. Smith*, 10 Wall. 321, 19 L. ed. 933. In *Choate et al. v. Trapp*, 224 U. S. 665, 56 L. ed. 941, the distinction between the right to exemption from taxation based on a sufficient consideration, and the power of Congress to impose a limitation on alienation, was expressly recognized. Meeting the contention of the state, that the Act of May 27, 1908 (35 Stat. at L. 312, c. 199) was not in fact a tax exemption, but was intended only to guard absolutely against alienation of the land, whether for taxes, or at judicial sale, or by private contract; or, differently expressed, that the tax exemption was only an additional prohibition against a sale, so that when the restrictions against alienation were removed by the act, the provision as to non-taxability went as a necessary part thereof, it was said:

"But the exemption and non-alienability were two separate and distinct subjects. One conferred a right and the other imposed a limitation. * * * The right to remove the restriction was in pursuance of the power under which Congress could legislate as to the status of the ward, and lengthen or shorten the period of disability. But the provision that the land should be non-taxable was a property right, which Congress undoubtedly had the power to grant."

It will be seen that the statute involved undertook to destroy this right by making lands from which restrictions had been removed, subject to taxation by the local taxing authorities. Sec. 22 contains no such provision, but instead, requires that conveyances by full blood Indian heirs shall be subject to approval by the Secretary of the Interior, under such rules and regulations as he may prescribe.

We are not unmindful that the Circuit Court of Appeals, 81 in *Bartlett et al. v. United States*, 203 Fed. 410, 121 C. C. A. 520, held that it was not within the power of Congress to reimpose a restriction upon the alienation of land, against which none at the time existed. The *Bartlett* case did not involve the alienation of inherited lands, neither did it involve the relationship between the general government and full blood Indians. Besides, the act under consideration was that of May 27, 1908, which expressly excluded from its operation the imposition of restrictions removed from land by or under any law enacted prior to its passage. It was upon this ground that the decision was affirmed on appeal to the Supreme Court of the United States. *United States v. Bartlett et al.* 235 U. S. 72, 59 L. ed. 137. Sec. 9 of the latter act provided:

"That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land; provided, that no conveyance of any interest of any full blood Indian heir to such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee."

The court, however, had before it for construction, sec. 1 of the act continuing restrictions upon the living allottees, to which was attached the proviso already referred to. While it was said by the court, referring to the former section:

"If taken literally, the language which we have quoted from the act of 1908 is doubtless broad enough to impress all allotments of the class described, whether then subject to the original restriction or theretofore freed from it."

and it was held that on account of the proviso, the language was not to be taken literally. Whether this proviso includes inherited lands named in sec. 9 of the act, it is unnecessary to consider, for we are not construing the latter act, but instead, in the respect mentioned, distinguishing it from the former.

Whether in principle the Bartlett case may be distinguished from the one under consideration, need not be considered or determined, for in the recent case of *United States v. Western Investment Company*, 226 Fed. 726 — C. C. A. —, it was held, that though 82 the period for which the Creek allotment made a prior allotment to an Indian, confirmed thereby, alienable by the allottee or his heirs without approval of the Secretary of the Interior, expired before enactment of the Act of April 26, 1906, ch. 1876, Sec. 22 (34 Stat. at L. 145) prohibiting full blood heirs of a deceased Indian conveying his land without approval of such officer, a conveyance by such heir of such land after such enactment, was subject thereto. In that case, according to the opinion, the lands inherited by the grantor, Mary Bird, a full-blood Creek Indian, were free of restrictions from the 1st day of March, 1906, until April 26th following. The opinion is rested upon sec. 22 of the Act of April 26, 1906, requiring that conveyances by heirs who are full blood Indians, shall be subject to the approval of the Secretary of the Interior, and the decision of the Supreme Court in the Tiger case, that Congress had not by the Supplemental Creek Agreement, or by any other act, released its control over the alienation of full blood Creek Indians, and that it was within its power to continue to restrict such alienation by requiring the approval of the Secretary of the Interior of conveyances made by them.

In *United States v. Shrock*, 187 Fed. 870, it was said that it was within the power of Congress to impose restrictions upon the alienation of lands of Indian allottees, although restrictions imposed by prior legislation have expired by limitation. In *United States v. Allen*, 179 Fed. 13, 103 C. C. A. 1, it was held that it was within the power of Congress to enlarge the period within which an Indian allottee is prohibited from alienating his land beyond that imposed when the allotment is made, so long as the land is held by the allottee, although in the meanwhile he may have been made a citizen of the United States.

Nor does the opinion, in *re Heff*, 197 U. S. 488, 49 L. ed. 848, announced a different rule. In that case, sec. 6 of the general allotment Act of February 8, 1887 (24 Stat. at L. 388, ch. 119) provided:

83 "That upon the completion of said allotments and the patenting of the land to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of, and be subject to, the law,

both civil and criminal, of the state or territory in which they may reside; and no territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law."

Heff was convicted in the United States Court in 1904, with having violated the Act of Congress of January 30, 1897 (29 Stat. at L. 506, ch. 109) by selling intoxicating liquors to one John Butler, a Kickapoo Indian, to whom certain lands had been allotted under the Act of February 8, 1887. It was contended by the petitioner in his application for a writ of habeas corpus, that the Act of January 30, 1897, was unconstitutional as applied to the sales of liquor to an Indian who had received an allotment and patent of lands under the provisions of the Act of February 8, 1887, because it was provided in said act that each and every Indian to whom allotments had been made, should be subject to the laws, both civil and criminal, in the state in which said allottee might reside; and further, that said Butler, having received an allotment of land in severalty, and his patent therefor under the provisions of the allotment act, was no longer a ward of the government, but a citizen of the United States and of the state of Kansas, and subject to the laws, both civil and criminal, of said state. After reviewing a number of the decisions of that court, pertaining to the relationship between the government and the Indians, and the rights and obligations consequent thereon, it was said that a new policy had found expression in the legislation of Congress, the purpose of which was the breaking up of tribal relations, the establishment of separate Indians in individual homes, free from national guardianship, and charged with all the rights and obligations of citizens of the United States. The court said:

"Of the power of the government to carry out this policy there can be no doubt. It is under no constitutional obligation to perpetually continue the relationship of guardian and ward. It may at any time abandon its guardianship and leave the ward to
84 assume and be subject to all the privileges and burdens of one sui juris. And it is for Congress to determine when and how that relationship of guardianship shall be abandoned. It is not within the power of the courts to overrule the judgment of Congress. It is true there may be a presumption that no radical departure is intended, and the courts may wisely insist that the purpose of Congress may be made clear by its legislation; but when that purpose is made clear the question is at an end."

In a former treaty between the Kickapoos, concluded June 28, 1862 (Revision of Indian Treaties, art. 8, p. 449) it was provided:

"At any time hereafter, when the President of the United States shall have become satisfied that any adults, being males and heads of families, who may be allottees under the provision of the foregoing article, are sufficiently intelligent and prudent to control their affairs and interests, he may, at the requests of such persons, cause the land severally held by them to be conveyed to them by patent in fee simple, with power of alienation; and may, at the same time, cause to be * * * set apart and placed to their credit severally, their proportion of the cash value of the credits of the tribe principal

and interest, then held in trust by the United States, and also, as the same may be received, their proportion of the proceeds of the sale of lands under the provisions of this treaty. And on such patents being issued, and such payments ordered to be made by the President, such competent persons shall cease to be members of said tribe, and shall become citizens of the United States; and thereafter the lands so patented to them shall be subject to levy, taxation, and sale, in like manner with the property of other citizens."

In construing the two treaties the court said:

"Now the act of 1887 was passed twenty-five years after the treaty of 1862 with the Kickapoos, and must be construed in the light of that treaty. By the treaty it was declared that at the instance of the President, and upon compliance with specified provisions, certain of the Indians should be considered as competent persons, should cease to be members of the tribe and become citizens of the United States."

It was said that the act of 1897, being a police regulation, it could not be doubted that an act of Congress, attempting as a police regulation to punish the sale of liquor by one citizen of the state to another, within the territorial limits of that state, would be an invasion of the state's jurisdiction, and could not be sustained; and it would be immaterial what the antecedent status of either buyer or seller was. The point decided by the court was that when the United States granted the privilege or privileges of citizenship to an Indian, gave to him the benefit of, and required him to be subject to, the laws, both civil and criminal of the state, it placed him outside the reach of police regulations on the part

of Congress; that the emancipation from federal control thus
 85 created, could not be set aside at the instance of the government, without the consent of the individual and the state, and that this emancipation from the federal control was not affected by the fact that the lands it had granted to the Indian were granted subject to a condition against alienation or encumbrance, or the further fact that it guaranteed him an interest in tribal or other property. The difference in the facts before the court in the *Heff* case, and those before us, in no way makes the decision in that case an authority. Without enumerating these distinctions, several of which stand out conspicuously, it is sufficient to say that in that case, involving as it did a police regulation, there had been, by express Congressional enactment, an emancipation of the Indian from federal control, and by the express terms of which he became subject to both the civil and criminal laws of the state in which he resided. Here no such abdication of power or surrender of control appears, but instead, as already seen, the various acts of Congress touching the question of both the form of removal and imposition of restrictions, gave evidence conclusive of an intention on the part of the general government to continue, for the time being, its relation of guardianship over full blood Indians.

At the date of the passage of the Act of April 26, 1906, the Choctaw and Chickasaw Indians were residents of, and their lands were situated in, an unorganized territory. Their tribal govern-

ments were shorn of all power, and existed in name only. There was none other to control and manage their affairs than the general government. The legislation of Congress in behalf of the full blood Indians is a matter of current history. No less so, however, is the vigilance and activity displayed in the other branches of government, brought about by Congressional enactment. Many suits were brought by the United States in carrying out its policy of protection to those whom Congress regarded as dependents and

86 in need of protection. Indeed, at all times, on and since the passage of the act, has the government shown a most determined and persistent purpose to continue the exercise of the authority derived from its guardianship relation, and in the Enabling Act to see that the power was reserved to it.

A case sometimes cited as authority for a conclusion different from that which we have reached, is *Jones v. Meehan*, 175 U. S. 1, 44 L. ed. 49, where, however, a quite different question was before the court. In that case, Moose Dung, the younger, the heir at law of the senior Moose Dung, in 1891, executed to the Meehans a lease to certain lands which had been set apart to his father during the latter's lifetime, and of which estate the younger Moose Dung was the sole heir at law. Afterwards, in 1894, said younger Moose Dung executed a second lease to said lands to Jones. Subsequent thereto, and during the same year, Congress passed a joint resolution authorizing the Secretary of the Interior, in his discretion, to approve the latter lease. This was afterwards done, and the contest over the possession arose between the two lessees, a portion of the terms of the leases running concurrently. It was held that the elder Moose Dung, having acquired a complete title in fee simple, his heir, upon the estate devolved at his death, had the right to make the original lease, and that the interests of the lessees acquired thereby could not be divested by any subsequent action of the lessor, or by Congress, or of the executive department of the government. The court said:

"The Congressional resolution of 1894, and the subsequent proceedings in the department of the Interior, must therefore be held to be of no effect upon the rights previously acquired by the plaintiffs by the lease to them from the younger chief."

The decision, therefore, is not an authority for the contention that Congress is without power to impose restrictions on alienable allotted lands of full blood Indians.

It may be well to note that the act enjoined upon the Secretary of the Interior is in no sense judicial, but on the other hand is
87 purely ministerial. *Jennings v. Wood*, 192 Fed. 507, 112 C. C. A. 657. It follows the making of a bargain between the heir or heirs and the intending purchaser. The Secretary's jurisdiction is invoked only when the conveyance is presented to him for his approval. As was said in the above case:

"His connection with the transaction and his authority first arose after the minds of the contractors came together, and they must have been competent to make the contract submitted for approval. A disapproval was merely a veto."

The rule that the act is ministerial is the same under the Act of May 27, 1908, requiring the approval by the county courts of the deed of full blood heirs. *Tiger v. Creek County Court*, — Okl. —, 146 Pac. 912; *Bartlett v. Okla. Oil Co., et al.* 218 Fed. 380.

It should be remembered that the lands, the title to which is in controversy, were allotted to Cereña Wallace during her lifetime. What effect, if any, the act of 1906 would have on conveyances made by the full blood Indian heirs of enrolled tribal members who died subsequent to enrollment but before selecting their allotments, and where allotments were thereafter duly made in their name or on behalf of their heirs, not being directly involved, is not determined, and anything herein is not intended to affect the rights of such heirs or those holding under or through them. From what has been said, we are of the opinion that Congress, in the passage of the Act of April 26, 1906, acted within the scope of its lawful authority; and that the deed from Rachel James to the plaintiff in error, not having been approved as required by law, was void.

It follows that the judgment of the lower court should be and is affirmed.

All the Justices concur, except Hardy, J., dissenting.

88 And thereafter, at the January, 1916, Term of said court, on the 13th day of January, 1916, the following proceeding was had in said cause, to wit:

#4721.

J. H. BRADER

vs.

RACHEL JAMES, etc.

And now on this Jan. 13 1916 it is ordered by the court that the mandate of this court in the above cause be stayed for 30 days to afford opportunity to present application for allowance of writ of error.

89 And thereafter, at the January, 1916, Term of said Court, on the 18th day of January, 1916, the following proceeding was had in said cause, to wit:

#4721.

J. H. BRADER

vs.

RACHEL JAMES.

And now on this day, Mr. Justice Hardy files his dissenting opinion in the above entitled cause.

90 Filed Jan. 18, 1916. William M. Franklin, Clerk.

In the Supreme Court of the State of Oklahoma.

Number —.

J. H. BRADER, Plaintiff in Error,

—,
RACHEL JAMES, Defendant in Error.

Dissenting Opinion by Hardy, J.

91 HARDY, J., Dissenting:

I dissent from that portion of the opinion holding that the conveyance of the homestead lands was void.

It was necessary that the conveyance of the surplus lands be approved. *Gannon v. Johnson*, 40 Okla. 695.

Serena Wallace, the allottee, died October 27, 1905, after having selected the lands in controversy, as her allotment. This was prior to the passage of the act of Congress approved April 26, 1906, (34 Stat. L. 137), therefore the homestead descended free from restrictions upon the alienation thereof. *Mullen v. United States*, 224 U. S. 448, 32 Sup. Ct. 494, 56 L. Ed. 834. Upon reviewing the authorities cited by the court it is seen that the holding of the court in *United States v. Allen*, 179 Fed. 13, 103 C. C. A. 1, is stated in the 9th paragraph of the syllabus as follows:

"It is within the power of Congress to enlarge the period within which an Indian allottee is prohibited from alienating his land beyond that imposed when the allotment was made, so long as the land is held by the allottee, although in the meantime he may have been made a citizen."

This case was reversed by the Supreme Court in so far as it held that the United States could maintain a suit to set aside conveyances to lands after restrictions thereon had expired. *Mullen et al. v. United States*, *supra*; *Goat v. United States*, 224 U. S. 458, 56 L. Ed. 841; *Deming Inv. Co. v. United States*, 224 U. S. 471, 56 L. Ed. 847. In *United States v. Shrock*, 187 Fed. 870, decided by the Circuit Court for the Eastern District of Oklahoma, the opinion was expressly placed upon the ground that the question of the authority of Congress to reimpose restrictions upon the alienation of lands of Indian allottees was settled in the affirmative so far as this jurisdiction was concerned by the doctrine announced in *United States v. Allen*, *supra*.

In *United States v. Western Inv. Co.*, 226 Fed. 726, it was held that according to the provisions of the act of April 26, 1906, restrictions had been reimposed upon the conveyance of inherited lands by the heirs of a deceased Indian to whom an allotment had been made in his lifetime. It will be noted that in this case the District Court for the Eastern District of Oklahoma, from which court the

92 appeal was taken, had departed from its holding in the case of United States v. Shroek, and reached the conclusion that restrictions could not be reimposed, and the Circuit Court of Appeals, in reversing the case, reached the opposite result. The opinion cites no authorities in support of its conclusion other than the case of Tiger v. Western Inv. Co., 221 U. S. 286, 55 L. Ed. 738. I think I will be able to demonstrate that the case of Tiger v. Western Inv. Co. is not authority for such conclusion.

In Stevens v. Smith, 10 Wall. 321, 19 L. Ed. 933, the lands involved were reserved for the use of Victoria Smith, a half breed Indian, by the United States under the provisions of the treaty of June 3, 1825. By the 11th article of that treaty it was stipulated that the Nation should not sell the lands without permission of the Government, and the court observed that it would assume the contracting parties intended this prohibition to apply to the individual members of the Tribe. By act of May 26, 1860, the title of the United States to these lands, the use of which had been allotted to Victoria Smith, was conveyed to her, and this act declared void all prior contracts for the sale thereof and forbade any future disposition except by the Secretary of the Interior, on the request of the party interested. Only the use of the lands was allotted to Victoria Smith prior to the act of May 26, 1860, and by the very act of conveyance and as one of the conditions thereof the restrictions upon the alienation of said lands were imposed.

The case of Tiger v. Western Inv. Co., supra, involved the construction of the act of April 26, 1906, in so far as it affected the prohibition against alienation of allotted lands by the allottee or his heirs, created by the supplemental Creek agreement of June 30, 1902, which at the date of the act had not expired; and it was held that under these circumstances Congress had the power to *extend the restrictions*. In the opinion it is stated that the legislation proceeded "upon the theory that in the understanding of Congress at least *restrictions still existed* so far as inherited lands of full blood Indians are concerned;" and after a review of the policy of Congress in reference to legislation of this character, and referring to the fact that citizenship had been conferred upon Marchie Tiger, and that citizenship was not incompatible with restrictions upon

93 the alienation of said lands, it was said:

"*In this state of affairs* the Congress with plenary power over the subject, by a new act permitted alienation of such lands at any time, subject only to the condition that the Secretary of the Interior should approve the conveyance."

And after declaring the conclusion of the court to be that Congress had at all times the right to pass legislation in the interest of the Indians, it was further said:

"That in the present case when the act of 1906 was passed Congress had not released its control over the alienation of lands of full blood Indians of the Creek Nation. That it was within the power of Congress to *continue to restrict alienation* by requiring as to full blood Indians the consent of the Secretary of the Interior to a proposed alienation of lands such as are involved in this case. That it

rests with Congress to determine when its guardianship shall cease, and while it still continues, *it has the right to vary its restrictions* upon the alienation of lands in the promotion of what it deems the best interest of the Indians."

It is significant that throughout the entire discussion by the Court the distinction is made clear that at the time the act was passed *the restriction upon the lands involved had not expired*, and that the right of Congress to pass the act is placed upon the conditions existing, and this authority is stated to be that Congress may extend or vary existing restrictions and nowhere in the opinion is it said that Congress may reimpose restrictions after they have once expired.

The italics throughout this opinion are mine.

Of the authorities cited by the court we find that the Allen case was criticized by the same court that decided it; the opinion in the Shrock case was expressly based upon the holding in the Allen case, and was afterwards departed from by the court rendering the opinion therein; in *United States v. Western Inv. Co.*, the conclusion reached was expressly based upon the holding in *Tiger v. Western Inv. Co.*; and in *Tiger v. Western Inv. Co.*, is found no expression by the Supreme Court to the effect that a right exists upon the part of Congress to reimpose restrictions when they have once expired, and in *Stevens v. Smith* the restriction was a condition of the grant.

There is, and can be, no question at this time that when a restriction has expired by lapse of time it has been removed the same as if done by an express act of Congress or by the Secretary of the Interior. *United States v. Bartlett*, 235 U. S. 72, 59 L. Ed. 94 137; *Choate v. Trapp*, 224 U. S. 665, 56 L. Ed. 941.

In *Jones v. Meehan*, 175 U. S. 1, 44 L. Ed. 49, an Indian chief owned in fee land which fronted on a stream. The chief died and in 1891 his son and heir during the continuance of the tribal organization let the land to Meehan for 10 years. In 1894 he again let the same land to Jones for 20 years. In that year the Secretary of the Interior was authorized by Congress to approve the lease to Jones if the latter would increase the rental. This he did, and with the consent of the Indian and the Secretary of the Interior, the lease was made to Jones. Litigation followed, in which Meehan relied upon the first contract and Jones relied upon that made under Congressional authority. Judgment was for Meehan, and in reviewing the opinion in that case the Supreme Court, in *Choate v. Trapp*, supra, said:

"The court held that the subsequent act could not relate back so as to interfere with the right of property which the Indian possessed and conveyed as an owner in fee, and while Congress had power to make treaties, *it could not affect titles already granted by the treaty itself.*"

In *In Re Heff*, 197 U. S. 488, 49 L. Ed. 848, the court had under consideration the authority of the United States to punish under its police power the sale of liquor within a state by a citizen thereof to an Indian who had selected an allotment under the act of February 8, 1887, (24 Stat. L. 388), by which it was provided that each

allottee thereunder should have the benefits of and be subjected to the laws of the state where he resides; and by the terms of which citizenship was conferred upon each such allottee. The contention was made that because the purchaser was an Indian, notwithstanding he had taken his allotment under the terms of the act and as a citizen of the United States and of the State of Kansas, the United States might punish the sale of liquor to such Indian. In denying this contention, the court, speaking through Mr. Justice Brewer, said:

"But the logic of this argument implies that the United States can never release itself from the obligations of guardianship. That so long as an individual is an Indian by descent Congress, although it may have granted all the rights and privileges of National, and therefore state, citizenship, the benefits and burdens of the laws of the states, may at any time repudiate this action and reassume its guardianship and prevent the Indian from enjoying the benefits of the laws of the state and release him from the obligations of obedience thereto. Can it be that because one has Indian, and only Indian, blood in his veins he is to be forever one of a special class over whom the General Government may in its discretion assume the rights of guardianship, which it has once abandoned; and this, whether the state or the individual himself consents? We
95 think the reach to, which this argument goes demonstrates that it is unsound."

And after noticing the fact that the lands of the Indian were restricted from alienation and declaring the rule that an allottee may enforce his right to any interest in the tribal or other property and that Congress may enforce and protect any condition *which it attaches to any of its grants*; further said that the fact that the property was subject to a condition against alienation did not affect the civil or political status of the holder of the title. The extent of the power of Congress to legislate respecting the personal and political status of such Indians was expressed as follows:

"But it is unnecessary to pursue this discussion further. We are of the opinion that when the United States grants the privileges of citizenship to an Indian, gives to him the benefits and requires him to be subject to the laws, both civil and criminal, of the state, it places him outside the police regulations on the part of Congress. That the emancipation from Federal control thus created cannot be set aside at the instance of the Government without the consent of the individual Indian and the state, and that this emancipation from Federal control is not affected by the fact that the lands it has granted to the Indian are granted subject to a condition against the alienation and encumbrance thereof, or the further fact that it guarantees to him an interest in tribal or other property."

The effect of the holding in the *Heff* case is that when Congress has released its guardianship over the personal and political status of the individual Indian to the extent of conferring citizenship on him so that he becomes a citizen of the United States and of the State in which he resides, this grant cannot be retracted without the consent of the State of which he is a resident and the individual

himself. This is true because he owes certain duties and is under certain obligations to the state of his residence and has the rights therein of other citizens. If the theory of the court be true that because Congress has made an improvident grant to the Indian of property rights those rights may be taken away because he is still a citizen of the Tribe, then by parity of reason a grant of citizenship may also be retracted because guardianship has not been fully and completely surrendered.

96 In *Bartlett v. United States*, 203 Fed. 410, the Circuit Court of Appeals for the Eighth Circuit, being the same court which rendered the opinion in the Allen case and in the case of *United States v. Western Inv. Co.*, in the course of its opinion said that Congress could not by virtue of the guardianship of the United States deprive an individual Indian of his full property rights in and to his lands and reimpose restrictions upon the alienation thereof, and the expression in the Allen case to the contrary was referred to as "mere obiter."

In *Hemmer v. United States*, 204 Fed. 898, a Sioux Indian by the name of Taylor, under the act of March 3, 1875, which gave the benefit of the Homestead Laws to Indians that might abandon their tribal relations and avail themselves of the homestead laws, but placing a restriction of five years upon the alienation of the lands so homesteaded, entered 160 acres of land in reliance upon said act, and on June 10, 1884, had resided thereon the required length of time to entitle him to make final proof and receive his patent. On July 4, 1884, less than a month thereafter Congress passed an act enlarging the class of Indians who might avail themselves of the homestead act, and providing a 25 year restriction instead of 5 years. The Court held that the act of 1884 did not apply to Taylor's homestead, he having entered his land under the act of 1875, and resided thereon the full time required before the passage of the act of 1884, and that the latter act did not have the effect of reimposing a restriction for 25 years upon the alienation thereof, although his conveyance was not executed until August 8, 1908.

The question here is whether the right to alienate his allotted or inherited lands is a property right which vests in the individual Indian upon the removal of restrictions. If it be such, it is protected from legislative impairment by the 5th Amendment to the Federal Constitution. I maintain that it is such a right and therefore the right to reimpose restrictions thereon does not exist.

In *Choate v. Trapp*, *supra*, the court held the exemption from taxation to be a vested property right, which could not be impaired.

In *Mullen v. United States*, *supra*, speaking of the interests
97 of the heirs of an Indian who died before receiving his allotment, which was afterwards selected in his name, it was said:

"These Indian heirs were vested with an interest in the property which in the absence of a provision to the contrary, was the subject of sale. The fact that they were "full-blood" Indians makes no difference, for at the time of the conveyances in question heirs of the full blood, taking under the provisions of paragraph 22 of the sup-

plemental agreement, had the same right of alienation as other heirs."

The right to inherit, purchase, lease, sell, hold and convey real and personal property is guaranteed to every citizen of the United States, by sec. 1978, Rev. Stat., being the "Civil Rights" act. In the Civil Rights cases, 109 U. S. 3, 27 L. Ed. 835, it was said that Congress by passing the act under consideration had undertaken "to secure to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely: the same right to make and enforce contracts to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens."

See also: *Algeyer v. State of Louisiana*, 165 U. S. 580, 41 L. Ed. 832; *Lochner v. New York*, 198 U. S. 45, 49 L. Ed. 937; *Powell v. Penn.*, 127 U. S. 678, 32 L. Ed. 253.

The term "property" has a most extensive significance, and according to its legal definition, consists in the free use, possession, enjoyment and disposition by a person of all his acquisitions, without any control or diminution save only by the laws of the land. The term not only includes the thing over which dominion may be exercised, but in its broader sense is that dominion or right of use and disposition which one may exercise over subjects or things, to the exclusion of others, and includes the right to possess, use, enjoy and dispose of a thing; and it is hard to conceive of property without these rights and attributes therein. 1 Blackstone Comm. 138; Black's Law Dictionary, title, Property; Anderson's Law Dictionary, title, Property. The authorities defining property are collected in Words & Phrases, title, Property, (First and Second Series).

It is true that the right to use and dispose of such property may be regulated by the laws of the land, but this means "regulation" and does not include the right to take or destroy the same without due process of law, and without just compensation. The

98 State may require that a deed of conveyance shall be in writing, and shall be acknowledged and recorded and may specify the manner of acknowledgment and the officer before whom it shall be executed. But when the right to convey, after it has once vested, and where the grantor is possessed of the full legal and equitable title in the thing conveyed, without condition or restriction, is made to depend upon the will of some third person with the power of veto, the right has been seriously impaired and in effect destroyed. As to a citizen of the United States not of Indian blood, it is conceded this could not be done. No distinction exists in this respect between a white person and an Indian. In *Choate v. Trapp*, it was said:

"There have been comparatively few cases which discuss the legislative power over private property held by the Indians. But those few all recognize that he is not exempted from the protection guaranteed by the Constitution. His private rights are secured and enforced to the same extent and in the same way as other residents or citizens of the United States. Re *Heff*, 197 U. S. 504, 49 L. Ed. 855, 25 Sup. Ct. 506; *Cherokee Nation v. Hitchcock*, 187 U. S. 307, 47 L. Ed. 190, 23 Sup. Ct. 115; *Jackson, ex dem. Smith v. Goodell*,

20 Johns. 188; Lowry v. Weaver, 4 McClean, 82, Fed. Cas. No. 8584; Whirlwind v. Vonder Ashe, 67 Mo. App. 628; Taylor v. Drew, 21 Ark. 487. His right of private property is not subject to impairment by legislative action, even while he is, as a member of a tribe, subject to the guardianship of the United States as to his political and personal status.

Referring to the right of Congress to remove restrictions upon the alienation of Indian lands it was said the right was in pursuance of the power of Congress to lengthen or shorten the period of the Indian's disability, but it was further said that:

"No statute would have been valid which reduced his fee to a life estate, or attempted to take from him 10 acres or 50 acres, or the timber growing upon the land."

It was conceded by eminent counsel therein that no right which was actually conferred could be arbitrarily abrogated by statute, and the court in the discussion of the case said:

"If there were any question as to whether this was a personal privilege and repealable, or an incident attached to the land itself for a limited period, that doubt under this rule, must be resolved in favor of the patentee."

Determining the effect to be given to the decision in Tiger v. Western Inv. Co., which the court thinks justified its conclusion
99 that restrictions may be reimposed on these homestead lands after the original restriction had been removed, the Supreme Court said:

"Nothing that was said in Tiger v. Western Inv. Co. (citing it) is opposed to the same conclusion here, for that case did not involve property rights but related solely to the power of Congress to extend the period of the Indian's disability. *The statute did not attempt to take his land or any right, member or appurtenance thereunto belonging. It left that as it was.*"

The court then gave the reason underlying the legislation by Congress which extended the time during which the allottee could not sell, and called attention to the fact that, "Tiger was still a ward of the Nation so far as the alienation of his lands was concerned, and a member of the existing Creek Nation;" and after stating the rule that citizenship was not incompatible with guardianship, the court continued:

"*But there was no intimation that the power of wardship conferred authority on Congress to lessen any of the rights of property which had been vested in the individual Indian by prior laws or contracts. Such rights were protected from repeal by the provisions of the 5th Amendment. * * * We have seen that it was a vested property right which could not be abrogated by statute.*"

And again in the opinion it was said with reference to the power of Congress to legislate with respect to tribal property, that:

"There is a broad distinction between tribal property and private property; and between the power to abrogate a statute and the authority to destroy rights acquired under such law. Reichert v. Phelps, 6 Wall. 160, 18 L. Ed. 849."

Thus it is shown that the right to alienate property is property

itself, and it is conceded that if such right has vested in a white person that right could not be impaired even by Congress. So it is also seen that with reference to vested private rights there is no distinction between and Indian and any other citizen of the United States. This being true, any legislation which would impair or lessen such right would be invalid. There is no question about the right of Congress to impose as a condition of its grant restrictions upon the alienation thereof, because the title vests subject thereto, and same operates as a condition annexed to the title; but when full and complete title in fee simple without condition or restriction has vested, the right of disposition is a property right and is protected by the 5th amendment.

100 In *Chase v. United States*, 222 Fed. 593, 138 C. C. A. 117, the United States as trustee and guardian of the Omaha Tribe of Indians and of Rose Wolf Setter, a member of said tribe, brought suit against Hiram Chase, the sole heir of the grantee of a tract of 40 acres of land under section 4 of the Treaty of March 6, 1865, with the Omaha Tribe of Indians (14 Stat. 667, 668). The question there was whether Hiram Chase, the sole heir of the grantee of said tract or Rose Wolf Setter, the sole heir of the grantee of the same land under section 5 of the act for the sale of a part of the reservation of that Tribe, of August 7, 1882, (22 Stat. c. 434, pp. 341, 342), had the title and the right of possession of the tract. In other words, whether the treaty of 1865 granted to Clarissa Chase, the mother of defendant, a substantial title to or right in the land in question or a mere revocable license to the possession and use thereof. In reversing the case with instructions to render judgment on the merits in favor of Hiram Chase, the court said:

"If by the treaty of 1865 a substantial right or title to the land in question was granted to or vested in Clarissa Chase and her heirs, the subsequent act of Congress of 1882 was ineffective to impair or destroy that right or title because:

First, Indians as well as other residents and citizens of the United States are protected by the fifth amendment to the Constitution against deprivation of property, life or liberty without due process of law. No act of Congress or legislative fiat constitutes due process of law, whereby a vested right in or title to property may be either seriously impaired or destroyed. *Choate v. Trapp*, 224 U. S. 565, 670, 677, 32 Sup. Ct. 565, 56 L. Ed. 941; *Jones v. Meehan*, 175 U. S. 1, 20 Sup. Ct. 1, 44 L. Ed. 49; *In Re Heff*, 197 U. S. 488, 504, 25 Sup. Ct. 506, 49 L. Ed. 848; *Cherokee Nation v. Hitchcock*, 187 U. S. 294, 307, 23 Sup. Ct. 115, 47 L. Ed. 183; *Jackson v. Goodnell*, 20 Johns (N. Y.) 188; *Lowry v. Weaver*, 4 McLean, 82, Fed. Cas. No. 8,584; *Whirlwind v. Von der Ahe*, 67 Mo. App. 628; *Taylor v. Drew*, 21 Ark. 485.

Second, Except in political cases, and this case is not a political case, Congress has no power under the Constitution of the United States to affect the rights or titles granted by a treaty, or to determine what rights were granted thereby. Nor may the character of the right or interest granted to Clarissa Chase by the treaty of 1865 be determined by the opinion of Congress that that right or inter-

est was revocable and negligible, though it be evidenced by its declaration in the act of 1882 that after the new allotments were made under that act the certificates of right and title issued by the Commissioner of Indian Affairs under the treaty of 1865 should be null and void. The construction of treaties and the determination of the character and extent of the rights and titles granted under them is a judicial, and not a legislative function, and by the Constitution the power is granted, and the duty, which may not be renounced, is imposed upon, the courts to form and enforce their independent judgments upon those questions, although these judgments may differ from the opinions of the Congress or its members. *Jones v. Meehan*, 175 U. S. 1-32, 20 Sup. Ct. 1, 44 L. Ed. 49; *Wilson v. Wall*, 6 Wall. 83, 89, 18 L. Ed. 727; *Reichert v. Phelps*, 6 Wall. 160, 162, 18 L. Ed. 849; *Smith v. Stephens*, 10 Wall. 321, 327, 19 L. Ed. 933; *Holden v. Joy*, 17 Wall. 211, 21 L. Ed. 523.

101

If it be once established that Congress may reimpose restrictions upon lands from which same have been removed, it may impose restrictions where none existed; then if such Indian received title to other lands by inheritance from a white ancestor or purchased same from funds accumulated by his own toil and industry, the fact of guardianship by the United States over him would authorize Congress to impose restrictions upon the use, enjoyment and disposition of such property, and also to withdraw the same from state or municipal taxation. It seems clear that such cannot be done, and if it cannot be done, upon what principle can it be said that Congress may draw to itself control over the alienation of other lands, the title of which, both legal and equitable, has been conveyed to the Indian, simply because such lands at one time comprised a part of the Indian domain? If this power may be exercised with reference to the lands, why may it not be exercised with reference to all kinds of property, even to the extent that if an Indian has a sum of money in the bank, legislation might be enacted placing restrictions upon the disposition and use of such property or money? This is not an illogical deduction from the opinion of the court, and demonstrates the consequences that might possibly follow if guardianship over the Indian be the sole test of the right of Congress to legislate in the respects mentioned. Mixed bloods of whatever degree of blood, together with intermarried citizens, are still wards of the nation in the sense that they are members of existing tribes, and that their tribal affairs have not been completely wound up and their tribal existence dissolved. In this sense they are as much wards of the government as the full blood heirs of a deceased allottee, and if Congress possesses the power to reimpose a restriction upon the alienation of the lands of a deceased allottee by the heirs thereof in the case of full bloods, as in the case at bar, should Congress determine that previous legislation was unwise, it might reimpose restrictions upon the alienation of the lands of all allottees without regard to the quantum of blood, including intermarried citizens, and might reenact any legislation regulating the property and affairs of the tribes. Some of the representatives of the State in the halls of the National

102 Congress are members of the Indian tribes, and would be brought within the terms of such restrictive legislation. In short, the Congress could withdraw from the jurisdiction of the state and from the operation of its laws all of the lands in at least one-half of the state, the title to which is still in the hands of the members of Indian Tribes. It seems to me clear that this cannot be done.

If Congress may reimpose restrictions upon lands which were selected in the lifetime of the allottee and afterwards descended to his heirs, it may also impose restrictions upon lands which were allotted in the name of Indians who died prior to selecting their allotment. In *Skelton v. Dill*, 235 U. S. 206, 59 L. Ed. 198, and in *Atkins v. Arnold*, 235 U. S. 417, 59 L. Ed. 294, it was held that the restrictions imposed by section 16 of the supplemental Creek agreement of June 30, 1902, applied only to allotments made to living citizens in their own right and not to allotments made on behalf of deceased persons under the authority of section 28 of the original agreement of March 1, 1901.

The fact that the legislation may not have been for the best interests of the Indian is not a sufficient reason for the court to depart from the terms of the act as written. As was said by the Supreme Court in *United States v. First National Bank of Detroit*, 234 U. S. 245, 58 L. Ed. 1298:

"If the true construction has been followed with harsh consequences, it cannot influence the court in administering the law. The responsibility for the justice or wisdom of legislation rests with Congress, and it is the province of the courts to enforce not to make laws."

The policy of Congress with reference to the Indians is stated in *Re Heff*, supra, where, after reviewing legislation upon similar questions, it was said:

"Of late years a new policy has found expression in the legislation of Congress. A policy which looks to the breaking up of tribal relations, the establishing of the separate Indians in individual homes free from national guardianship and charged with the rights and obligations of citizens of the United States."

This being the policy of Congress, the statute should be so construed as to be in harmony therewith, and *so as not to interfere with existing rights which have been vested under prior laws*. The rule

as stated in 2 Sutherland Stat. Const. sec. 488, is as follows:

103 "In the construction of the provisions of any statute they ought to receive such a reasonable construction if the words and subject matter will admit of it as *that the existing rights of the public or of individuals be not infringed*."

In order to ascertain the legislative intent it is a familiar rule of construction that subsequent legislation upon the same subject may be referred to. *Tiger v. Western Inv. Co.*, supra. The act of May 27, 1908 (35 Stat. L. 312) was an act which extended or enlarged restrictions upon the alienation of all allotted lands of mixed bloods of three-fourths or more Indian blood. In that act it was provided:

"Nothing herein shall be construed to impose restrictions removed from lands by or under any law prior to the passage of this act."

Here was a declaration by Congress that legislation of the character involved was not intended to reimpose restrictions which had been removed. Taken in connection with the act of 1906, the conclusion seems to follow that no such effect was intended by that act. On February 27, 1907, Hon. Frank M. Campbell, Assistant Attorney General, in an opinion to the Secretary of the Interior, considering section 22, said:

"This section provides the manner in which sales may be made notwithstanding any restrictions upon alienation, and seems to apply to the heirs of all deceased allottees, without regard to quantum of Indian blood. It cannot however be held to apply to heirs who received their inheritance free from all restrictions. There would have been no occasion for this provision or field for its operation if the same provision which relates to homesteads had extended to the other or surplus allotted lands. The provision in the act of July 1, 1902, *supra*, is that they may be alienated, one-fourth in acreage in one year, One-fourth in two years and the balance in five years from the date of the patent. There is no permissible construction of said section 22 except that it applies so far as Choctaws and Chickasaws are concerned, to these surplus lands, which descend to the heirs burdened with restrictions upon the alienation, and not upon the homestead which descends free of all restrictions." Bledsoe on Indian Land Law, (1st Ed.) p. 303.

On August 17, 1909, the Attorney General construed the act of May 27, 1908, and held that conveyances made by full blood heirs of lands inherited by them prior to the act of May 27, 1908, were not valid unless approved by the Secretary of the Interior, and held further that the provisions of section 9 of said act should not be held to operate retroactively and to remove absolutely all restrictions upon the alienation of lands of an allottee who died prior to the passage of that act. 27 Opinions Attorney General, p. 530. On June 7, 1911, that official rendered an opinion holding that lands allotted to the Choctaws and Chickasaws under the supplemental treaty, (Act of July 1, 1902), could not be conveyed prior to act of April 104 26, 1906, by the full blood heirs of such allottees within the period of inhibition named by the former act, as that section was not retroactive. 29 Opinions Attorney General, p. 131.

For the foregoing reasons I think the deed to the homestead was valid without approval.

105 In the Supreme Court of the State of Oklahoma.

Certificate.

I, Wm. M. Franklin, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the foregoing 104 pages, numbered from 1 to 104, both inclusive, are a full, true and complete transcript of the record and all proceedings had in this court in case number

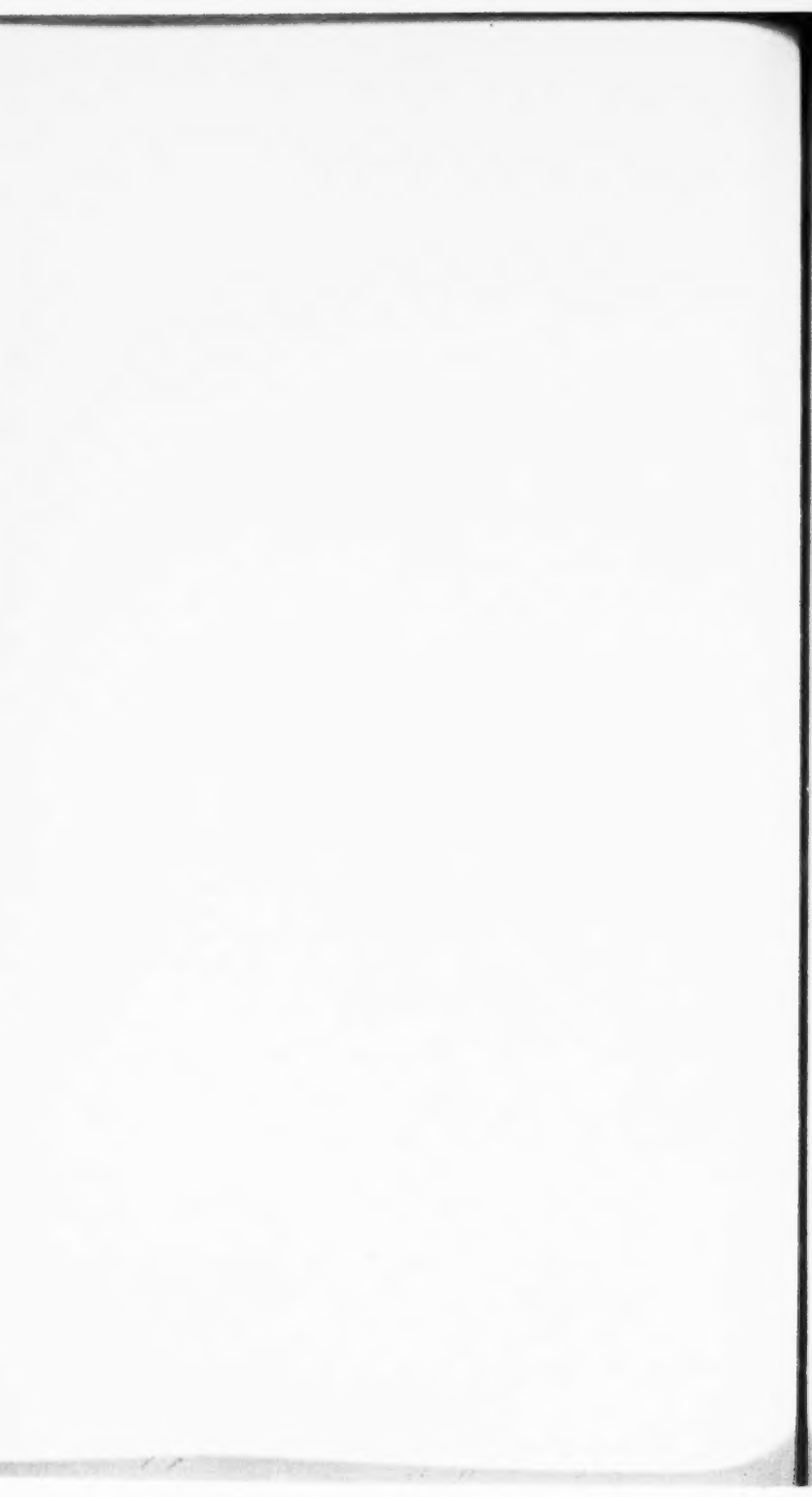
4721, J. H. Brader, Plaintiff in error, versus Rachel James, formerly Rachel Reeves, Defendant in error, as the same remain of record and on file in my office.

In witness whereof, I hereto set my hand and affix the seal of said court, at Oklahoma City, Oklahoma, this 2nd day of March, 1916.

[Seal Supreme Court, State of Oklahoma.]

WM. M. FRANKLIN,
*Clerk of the Supreme Court of the
State of Oklahoma.*

Endorsed on cover: File No. 25,190. Oklahoma Supreme Court. Term No. 415. J. H. Brader, plaintiff in error, vs. Rachel James, formerly Rachel Reeves. Filed March 20th, 1916. File No. 25,190.



WEEKLY SUPPLEMENT
NO. 22, 1917
JANUARY 11, 1917

**In the Supreme Court of the United
States**

No. 415. 189

OCTOBER TERM, 1916.

J. H. BRADER, PLAINTIFF IN ERROR,
v.
RACHEL JAMES, FORMERLY RACHEL REEVES,
DEFENDANT IN ERROR.

BRIEF OF THE PLAINTIFF IN ERROR.

E. A. BLYTHE,
Attorney for Plaintiff in Error.

J. H. Brader, Jr.
Harlow's, Okla. City

INDEX.

	Page
STATEMENT OF FACTS.....	1 to 3
SPECIFICATION OF ERROR.....	3 to 6
ACTS OF CONGRESS TO BE CONSTRUED.....	6 to 7
BRIEF	7 to 10
ARGUMENT IN SUPPORT OF BRIEF.....	10 to 26

CASES CITED.

<i>Adkins v. Arnold</i> , 235 U. S. 214.....	8
<i>Bartlett v. U. S.</i> , 203 Fed. 410, 121 C. C. A. 520..	8-9
<i>Bowling v. U. S.</i> , 233 U. S. 528.....	8
<i>Cherokee Nation v. Hitchcock</i> , 187 U. S. 294....	8
<i>Jefferson v. Cook</i> , 155 Pac. 852.....	9
<i>Mullen v. U. S.</i> , 224 U. S. 448.....	8
<i>Sunday v. Maltory</i> , 237 Fed. 526.....	8'
<i>Sunday v. Mallory</i> , 237 Fed. 526.....	10-21
<i>United States v. Hemmer</i> , 36 Sup. Ct. Rep. 659..	8
<i>U. S. v. Bartlett</i> , 235 U. S. 72.....	8
<i>Skelton v. Dill</i> , 235 U. S. 448.....	8
<i>Washington v. Miller</i> , 235 U. S. 422.....	9
<i>Western Investment Co. v. Tiger</i> , 221 U. S. 286	
.....	6, 7, 8, 10, 15
<i>Washington v. Miller</i> , 235 U. S. 422.....	9

TEXT-BOOKS CITED.

<i>Endiloch on Interpretation of Statutes</i> , Sec. 223.	9
---	---

In the Supreme Court of the United States

No. 415.

OCTOBER TERM, 1916.

J. H. BRADER, PLAINTIFF IN ERROR,

v.

**RACHEL JAMES, FORMERLY RACHEL REEVES,
DEFENDANT IN ERROR.**

BRIEF OF THE PLAINTIFF IN ERROR.

THE FACTS.

The parties will be referred to as they were in the trial court.

August 28th, 1912, Rachel James brought suit against the defendant J. H. Brader for possession of two hundred acres of land in Choctaw County, Oklahoma. The suit has a count for damages for a period of time during which she alleged the defendant had occupied the premises. It was alleged to have been allotted to her deceased mother, Serena Wallace, a full-blood Choctaw Indian, and that plaintiff was also enrolled as a full-blood of the Choctaw Tribe. The defendant filed his answer admitting the death of the allottee Serena Wallace in 1905, and that both she and her daughter, the plaintiff, were full-blood

Choctaw Indians, and duly enrolled, and that he owned said land under deed from defendant in error dated Aug. 17, 1907. He set up the further fact that one hundred sixty acres of the land sued for had been allotted and patented prior to the death of said allottee under Section 12, of the Act of Congress of July 1st, 1902. As to the remaining forty acres, no averment of either the petition or the answer set out the character of the title by which it was originally acquired. However, in fact, it was allotted under Section 16, of the said Act of 1902, and was restricted after the death of the allottee until some time in the year 1905, and under the authorities cited will be abandoned. The plaintiff filed a general demurrer to the answer. It was sustained by the court on the theory that admitting the allotment to have been made under the Act of 1902, the deed of the plaintiff under which the defendant claimed executed on the 17th day of August, 1907, was rendered invalid by that provision of Section 22, of the Act of April 26, 1906, 34 U. S. Statutes at Large, page 137, which required all conveyances made under that provision, to be subject to the approval of the Secretary of the Interior.

Thereafter, the court introduced testimony to establish the damages as alleged (see the record, pages 9 to 20, inclusive) and rendered judgment as prayed for for possession of the land in controversy (see pages 19 and 20 of the record); an appeal was taken to the Supreme Court of Oklahoma (see record, pp.

35-36 and 37), the court rendered its opinion sustaining the action of the lower court, and on May the 18th, 1915, rendered its first opinion (see page 22 of the record). Thereafter a petition for rehearing was filed, and in a second opinion by the court, with one dissent, the original was adhered to (see pages 35 to 38 of the record), and the case comes to this court on writ of error from the Supreme Court of the State (pages 1 to 8 of the record; certificate of the clerk of the Supreme Court, pages 66 and 67).

SPECIFICATIONS OF ERROR.

The errors assigned are as follows:

First: The said Supreme Court erred in holding and deciding that said Section 22 of said Act of Congress approved April 26, 1906, 34 U. S. Statutes at Large, page 137 (providing all conveyances made under this provision by heirs of full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe), applied to and required an approval of said deed of conveyance from said defendant in error (the plaintiff) to said Tillie Brader, the predecessor in interest of plaintiff in error, dated August 18th, 1907, and therefore, that the title of plaintiff in error to the property sued for, was void.

Second: That the said Supreme Court erred in holding and deciding that said provision requiring approval applied to said deed made as aforesaid, by

the defendant in error, an heir, who is a full-blood Choctaw Indian, and that the lands in controversy inherited by her from the full-blood Indian allottee of said tribe could not be conveyed, and her title thereto divested without the approval of the Secretary of Interior.

Third: Section 22 of said Act of April 26th, 1906, among other things, provides:

“That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the lands, or the tribe to which he or she belongs, or belonged, may sell and convey the lands inherited from such decedent * * * all conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior under such rules and regulations as he may prescribe.”

That said Supreme Court erred in holding and deciding that the defendant in error could not convey, and did not convey, and thereby vest her purchaser, the said Tillie Brader, the plaintiff in error (the defendant), with a good and indefeasable title to the lands in controversy, without the approval of the Secretary of the Interior, under rules and regulations prescribed by him, such lands having been inherited by her, a full-blood Indian and member of the Choctaw Tribe, from said full-blood allottee of

said tribe from whom the same was inherited; and in holding and deciding that the above provisions of said Section 22, were operative and applicable to said inherited lands sold as aforesaid, and did affect the status and right of alienation of such lands by requiring the approval of the Secretary of the Interior.

Fourth: That said Supreme Court erred in affirming a judgment and decree of the trial court rendered in said cause, and in refusing and denying to plaintiff in error the rights afforded him under the Act of Congress aforesaid.

Fifth: That said Supreme Court of the State of Oklahoma erred in holding and deciding that said Section 22 of said Act of 1906, given the aforesaid effect, was within the power given to Congress by the Constitution of the United States, and was therefore a valid exercise of the law-making power vested in Congress under the express and implied provisions of the Constitution of the United States.

Sixth: That said Court erred in deciding that said Section 22 giving that said effect was a valid and constitutional enactment and not in conflict with that part of the fifth amendment to the Constitution of the United States which provides "that no person shall be deprived of life, liberty or property without due process of law," and in holding and deciding that said lands so held by the defendant in error from said date in 1905 to the date of the approval of said

Act of April 26, 1906, were subject to be withdrawn from alienation by the defendant in error, regardless of the property rights then vested and regardless of her admitted citizenship (see pages 4 and 5 of the record).

THE LAW OF THE CASE.

These Indians became citizens of the United States by Act of Congress of March 3rd, 1901, 31 U. S. Statutes at Large, page 1447, Chapter 868, and *Tiger v. Western Investment Co.*, 221 U. S. 286. Thereafter the allotment was made under said Section 12 of said Act of 1902, which provides:

"Each member of said Tribe (referring to said Indian) shall at the time of the selection of his allotment designate as a homestead out of said allotment, land equal in value to 160 acres of the average allottable land of the Choctaw and Chickasaw Nations, as nearly as may be, which shall be inalienable during the *lifetime* of the allottee, not exceeding 21 years from the date of the certificate of allotment, and separate certificate and patent shall issue for said homestead."

Section 22 of said Act of 1906, which contains the requirement for the approval provides:

"That the adult heirs of any deceased Indian of either of the Five Civilized Tribes * * * to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs, or belonged, may sell and convey the lands inherited from such decedent, and if there

be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States court for the Indian Territory, and in case of the organization of the state or territory, then by a proper court of the county in which said minor or minors may reside, or in which said real estate is situated, upon an order of such court made upon petition filed by guardian, all conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior under such rules and regulations as he may prescribe."

From the foregoing, it will be seen the Indians became citizens of the United States, without qualification, in 1901, that the lands thereafter allotted were impressed by Section 12 of the Act of 1902, with a restraint on alienation which expired in this case with the *death* of the *allottee* in 1905, and the question presented was the sale in controversy of the lands in 1907 affected by the requirement for approval, contained in the Act of 1906?

BRIEF.

The grantor whose conveyance is called into controversy became a citizen of the United States by Act of Congress of March 3rd, 1901.

31 U. S. Statutes at Large, page 1447,
Chapter 868.

Tiger v. Western Investment Co., 221 U.
S., page 286.

By the gift of citizenship the foreign or dependent status of the members of the nation or tribe, was changed in all particulars except as to such choses in action, annuities and other reserve properties as were originally retained by the United States in the different Acts of Congress leading up to and preceding the gift of citizenship.

Cherokee Nation v. Hitchcock, 187 U. S., page 294.

Tiger v. Western Investment Co., 221 U. S., page 286.

U. S. v. Bartlett, 235 U. S., page 72.

The lands in controversy were allotted and inherited by said plaintiff, a citizen of the United States, free from restrictions.

Mullen v. United States, 224 U. S., page 448.

Skelton v. Dill, 235 U. S., page 206.

Adkins v. Arnold, 235 U. S., page 214.

Bowling v. United States, 233 U. S., page 528.

By said Act of 1902 said plaintiff acquired the right under said Act of Congress to alienate said land which became vested.

Sunday v. Maltory, 237 Federal Reporter, page 526.

Bartlett v. United States, 203 Fed. Rep. 410, 121 C. C. A. 520.

United States v. Hemmer, 36 Sup. Ct. Reporter 659.

From the context of the acts of Congress which affect the interpretation of the statute and from the decisions of the courts construing them it was not the intention of Congress by the general law of 1906 to repeal any of the special laws of 1902.

Washington v. Miller, 235 U. S. 422.

Endiloeh on Interpretation of Statutes,
Sec. 223.

Jefferson v. Cook, 155 Pac. 852.

For the reason that the Act of Congress of 1902 under which this heir first took power to sell was one of five special laws. The later general act of 1906 in giving power to sell in general terms to all members of said tribe had a field of operation other than that covered by the former special one and for this reason the condition or approval required in the act of 1906 is inoperative in this case.

Washington v. Miller, 235 U. S. 422.

United States v. Hemmer, 36 Sup. Ct.
Rep., page 659.

Endiloeh on Interpretation of Statutes,
Sec. 223.

Jefferson v. Cook, 155 Pac. 852.

If Congress undertook to prohibit the alienation of said land by the Act of Congress of 1906, Sec. 22, 34 U. S. Stat. 134, in the hands of said full-blood heir possessed of an absolute estate in fee in the same it exceeded its power in view of the factum of her national citizenship.

Bartlett v. United States, 203 Fed. 410,
121 C. C. A. 520.

Sunday v. Mallory, 237 Federal 526.

Tiger v. Western Investment Co., 221 U. S. 286.

Two questions may be argued under the assignments of error. From the first to the fourth, inclusive, the question of the scope of the requirement for approval and under the remaining assignments the power of Congress to pass the legislation assuming the sale in fact to have been made under that act.

It will appear from the authorities cited by the Supreme Court that a great number are in support of the text of its opinion, but upon examination it will be found the language of the cited cases dealing with Indians is obiter. The error is clearly shown by the cases of *Bartlett v. U. S.*, 203 Fed. 410, and *Sunday v. Mallory*, in which the United States Circuit Court of Appeals, Eighth Circuit, says in substance: No case has been brought to our attention in which it has been held Congress may restrict land after the expiration of restrictions as against an Indian citizen of the United States. The same effect is given the Sunday-Mallory case.

Apart from the authorities cited the court in this case first considered the primary elements involved before it and ascertained as a matter of law the national citizenship of the defendant in error under the Act of Congress of 1901. It then proceeded and from the allotment act of 1902 and authority based upon it, found the title to the homestead fully vested

in the defendant in error free from restrictions. Or in other words found the express surrender of all rights, powers and prerogatives of sovereignty.

It then finds that once a condition of dependence or of national guardianship over Indians having been shown to exist its surrender would not be presumed. Beyond any reasonable doubt the personal status of the Indian was completely altered by the gift of citizenship in 1901. No limitation occurs in the act by which this was done. As to the land received after citizenship subject to the restriction, no doubt the title vested subject to that restriction and during its existence as said in the Tiger case it could be altered by Congress and that once altered it was a legislative and not a judicial question as to the value to be given its operation, but nothing in the case warrants the inference, as we contend that Congress had power to enter the field of private property, create classes of citizens and select their property by confiscatory legislation.

Indians of the Five Civilized Tribes in Oklahoma at this time are in all things upon an equal footing with the other citizens of the state; they attend the same schools and churches, vote equally and numbers are in public office. In this state no attempt is made upon the part of Congress to control any of the personal affairs of this class of people. No law exists affecting them except such laws against restrictions as were affixed to the lands allotted in 1902 as a *condition of the grant*.

The true basis of the laws of Congress respecting the origin of this former governmental control has become very uncertain, and the tendency to extend the language of reported cases to cover statements of fact at variance has caused confusion.

Blackstone, Vol. 1, Section IV, after discussing the conquest of the different parts of Great Britain and the surrounding islands, says:

"Plantations elsewhere are also in some respects subject to the English laws. Plantations or colonies in distant countries are either such where the lands are claimed by right of occupancy only, by finding them deserts and uncultivated and peopling them from the mother country, or where when cultivated they have been either gained by conquest or ceded to us by treaties. And both these rights are founded upon the law of nature or at least upon that of nations. But there is a difference between these two species of colonies with respect to the laws by which they are bound. * * * But in conquered or ceded countries that already have laws of their own the king may indeed *alter and change* those laws, but till he does actually change them the ancient laws of the country remain unless such as are against the law of God as in an infidel country. Our American plantations are principally of this latter sort, being obtained in the last century either by right of conquest and driving out the natives (with what natural justice I shall not at present inquire) or by treaties."

This plenary power arising under the laws of nations in favor of the mother country passed by succession to the original colonies.

Johnson and Graham, Lessee, v. McIntosh, 8 Wheat 541, 5 L. Ed. 681.

Justice Marshall, writing the opinion of the court, said:

"Conquest gives the title which the courts of the conquerer cannot deny. Whatever the private and speculative opinions of individuals may be respecting the original justice of the claim which has been successfully asserted, the British Government, which was then our government and whose rights have passed to the United States asserted the title to all the lands occupied by Indians within the chartered limits of the British Colonies. It also asserted limited sovereignty over them and the exclusive right of extinguishing the title which occupancy gave.

* * * The title by conquest is acquired and maintained by force. The conqueror prescribes its limits."

From that time under the principle of plenary control and the Constitutional and Congressional enactments provided for its execution, the Indians residing within the territorial limits of the United States as a semi-foreign nation have been subject to unilateral legislation. Treaties entered into between them and the Congress stand upon the footing of acts of Congress. *Gritts v. Fisher*, — U. S. —. Under it decrees and judgments of courts

founded upon such treaties have been nullified by subsequent acts of Congress. *Cherokee Nation v. Hitchcock*, 187 U. S., page 294. The limits of their tribal states changed without consent of the governed and from time to time those races imprisoned and segregated. It is largely from this the Supreme Court of the States finds its authority for establishing the power of Congress to divest property rights as among them.

This principle of international law has for its basis the fact that in such cases the control depends upon a foreign status, that in this case does not exist. It also depends upon a hostile status; neither does that exist respecting the Indian citizens of the United States. It is clearly evident that no personal or political difference whatever exists between the members of the Five Civilized Tribes and the other citizens of the State. As to them, there is no recognized divided sovereignty, and the existing legislation of Congress taken as a whole is limited for the protection of such subjects as were expressly reserved from the tribal property by the acts of Congress preceding the gift of citizenship. It goes without saying that in such cases, as by the Acts of 1898, — U. S. Statutes, page —, that the lands reserved from allotment for coal purposes, mineral and asphalt, are still subject to the plenary control of Congress. It is also true that as to those restrictions created as a condition attached to citizenship the power and duty of the general government would

be supreme, but it is also correspondingly clear that with the gift of citizenship all of the properties, moneys or other liquidated properties vesting in an Indian citizen would be a vested right, which on principle could not be divested by subsequent legislation.

In the *Tiger* case the court calls particular attention that at the time of the legislation of 1906 the lands had not passed from under the restrictions of the Act of 1902, and that under those circumstances the Indian in that case was a ward of the government so far as those lands were concerned.

In the *Bartlett* case, *supra*, the United States Circuit Court of Appeals reached the same conclusion, based upon the same principle. Also in the case of *Heckman v. U. S.*, — U. S. —, this court recognized that the guardianship was plenary only within those reserved limits, saying: "The power of Congress to extend restrictions upon alienation was sustained by this court in *Tiger v. Western Investment Co.*" (citing the case). There the question related to conveyances of inherited lands made by a Creek Indian of the full blood without the approval of the Secretary of the Interior as required by Section 22 of the Act of 1906. The conveyance had been executed after the expiration of the five-year limitation upon alienation prescribed by the supplemental agreement with the Creek Nation, but meanwhile and during the continuance of the original restric-

tion the Act of 1906 had been enacted. It was held that the restrictions of the later statute were valid.

Also in this case as well as in the Tiger case the language of the court goes to the effect that the restriction evidences to that effect the guardianship which has existed from the beginning.

“Referring to these general principles of law affecting the question, it may be admitted that the only justification for the re-imposition of restrictions would be the fact of tribal relationship and consequently the semi-foreign status of the Indian. Once admitting citizenship, and we find in *Coppage v. Kansas*, 236 U. S., page 1, 35 Supreme Court 240, in which it is said, among other things: ‘No doubt wherever the rights of private property exist there must, and will be, inequalities of fortune, and thus it naturally happens that parties negotiating about a contract are not equally unhampered by circumstances. This applies to all contracts. * * * Indeed a little reflection will show that wherever the right of private property and the right of free contract co-exist, each party when contracting is inevitably more or less influenced by the question of whether he has much property, or none. * * * And since a state may not strike them down directly, it is clear that it may not do so indirectly by declaring in effect that the public good required the removal of those inequalities that are the normal and inevitable result of their exercise.

“By Judge Hardy’s dissenting opinion filed in the case it is clearly shown that the free right

to contract or alienate lands is protected as to the individual by the constitutional guaranties."

Referring to the Act of 1906, its provisions applying in this case will read as follows, if simplified:

"The * * * heirs of any deceased Indian * * * may sell and convey the land inherited from decedent * * * All conveyances made under this provision * * * are to be subject to the approval of the Secretary of Interior."

In order to ascertain the object of this legislation, it is necessary to remember that, as was said in *Bartlett v. United States*, under prior legislation the lands of the Five Civilized Tribes has been allotted in severalty, all subject to restrictions upon alienation, which were to be terminated by the lapse of varying periods of time. As to some of the lands, these periods have expired, thereby lifting the restrictions. In some instances Congress had abrogated the restrictions in advance to the time fixed for their termination, and in still other instances they had been cancelled by the Secretary of the Interior in the exercise of the authority conferred by law, *but as to most of the lands the restrictions were still in force. It was in this situation that Congress by the Act of 1908 extended or enlarged the period of restrictions, etc.*

In this case the court was construing the Act of May 27, 1908, and the decided point is that restric-

tions were not re-imposed. *True* the act contained a provision that it was not intended to impose restrictions theretofore removed from any land by or under any law, but yet, in the discussion the Act of 1906 is construed *in para materia* with it as evidencing the general plan of Congress not to re-impose restrictions.

Bearing in mind that the general plan of legislation beginning with the Act of 1898, was intended to terminate all governmental supervisions over the different tribes in Eastern Oklahoma, it may be presumed a departure from it was not intended by any of the subsequent legislation. This emphasized by the tendency to remove restrictions contained in the Act of Congress of April 20, 1904, allowing sales of all lands in all cases except as to Indians, and except as to minors and homesteads. Also, by the provisions of this section, for in fact, although the lands in the hands of all Indians by inheritance were generally restricted. The act unconditionally gave power to sell and only required an approval as to full-bloods, in such instances as the heirs acquired power to make a sale under the first clause in the section.

Our point is that the entire controversy, apart from its constitutionality, depends upon the phrase, "*made under this provision.*" Or, that at the time this Act of 1906 was passed some of the inherited lands of full-blood heirs were still restricted under

a previous legislation, while other parts of such land had become unrestricted, that the authorization to sell and convey inherited lands as contained in the first sentence of the section had no field for operation, and was *not* intended to affect lands *then unrestricted*, but was intended to operate only with respect to lands which were then restricted, either in the hands of the allottee or heirs at law. That accordingly when the last sentence of the section speaks of conveyances made under this provision by heirs who are full-blood Indians, the phrase under this provision must have reference to conveyances by full-blood Indian heirs of the lands of the class upon which the first sentence of the section was intended to, and did operate upon, that is to say, lands that were on April 26, 1906, still under the restrictions imposed by one or more of the earlier special laws.

This particular section, then, would not have the effect of reimposing restrictions or of indicating a departure from a general plan of the final settlement of the affairs of the Five Civilized Tribes. In this connection it is significant that this tendency toward the removal of restrictions is expressly recognized by the concluding sentence of Section 1 of the Act of 1908, *supra*, and that it, instead of imposing restrictions, removed all restrictions upon the alienation of all lands of all Indians of either of the Five Civilized Tribes, including minors who were of less than one-half blood. It also gave to

all Indians of more than one-half and less than three-quarter Indian blood the power to sell the additional or surplus part of their allotted surplus. Yet the enactment carefully preserved its guardianship as evidenced by the restrictions which were not removed, and, irregular as it may seem, a three-quarter blood Indian could sell, free from all governmental control, one-half of his allotted land, yet could not lease the remaining moiety for more than one year.

By the Act of 1908, provisions were made for suits to be brought for the protection of the Indians mentioned in the act. Yet the wording is expressly limited to affect *restricted lands*. The significant feature of this suggestion is, that if instead of the words "under this provision" Congress had used the words "restricted lands," the net effect would have been the same. We argue that because Congress continues restrictions, it does not necessarily intend to reimpose them. Of course, it takes no authority to establish this. The fundamental plan to continue existing restrictions within such limits as Congress considered advisable is expressly referred to in the case of *Bartlett v. United States*, 121 C. C. A. 520, in which it was said that it was not within the power of Congress to impose restrictions upon the alienation of lands allotted to an Indian after the restrictions imposed by prior laws had expired, and that acts general in their terms should not be construed as intended to apply to such cases. The holding of

this cited case was discussed by the Supreme Court of Oklahoma in this case, and after some consideration it was disregarded on principle because of the very recent case of *The United States v. Western Investment Company*, 226 Fed. 726, 141 C. C. A. 482. Yet in the still more recent case of *Sunday v. Mallory*, from that court, 237 Fed. 526, the court said, referring to the Western Investment Company case: "Under Section of the original Creek agreement allotments made to citizens were inalienable during five years from ratification of the agreement, except with the approval of the Secretary of the Interior." This period had expired prior to the conveyance by Mary Byrd. However, the Act of April 26, 1906, 34 Statutes 137, had been passed, which by Section 22 provided that adult full-blood heirs of deceased Indians should make no conveyances without the approval of the Secretary of the Interior. The court then reviewed the holding of the Supreme Court of Oklahoma in this case and said "that it would seem to follow that if Congress had not the power to impose restrictions upon alienation after the original restrictions had been removed, it would not have the power to impose restrictions where none whatever had theretofore existed." The Supreme Court in its opinion calls particular attention to the Act of 1906 in continuing the Choctaw-Chickasaw tribal government, and also to the Enabling Act by which Oklahoma became a State. Yet the limitation that the tribal government is only continued

for such purposes as are authorized by law is entirely consistent with the general plan of the liquidation in Indian affairs. The Enabling Act itself also recognized the exception and limits the retention of governmental powers after Statehood in Indian matters to such things as are competent before Statehood, or to affirm the power of Congress in a particular instance is equivalent to its disaffirmance in others, to state the tribal government is continued for all purposes authorized by law is equal to a declaration that it is discontinued for all matters not within the scope of enactment. Then treating the restrictions as one of the reserve powers, the section in controversy is confining the requirement for approval to only such sales and conveyances as were permitted by the act is the limitation and equal to a declaration that no approval is necessary if the sale is made by virtue of other law, that the guardianship now exercised by the United States over the members of the Five Civilized Tribes is within the limits of former legislation. It is further shown by Section 3 of the Act of May 27, 1908, *supra*, in arbitrary, making the rolls of citizenship and of freedmen conclusive evidence as to the quantum of Indian blood the only question arising under that act; the same is also true of the enrollment records, and very significant that at no point in this act, in the Act of 1906 or 1904, or the Allotment Acts of 1902 have any provisions been made for the personal control over the members of the Five Civilized Tribes.

except such as could easily be justified for the purpose of carrying into effect the legislation respecting the properties and trust fund yet held by the United States for these tribes.

This court in the case of *United States v. Hemmer*, 36 Sup. Court 659, passed upon a case involving the rights of an Indian in some respects very similar to this. There under Acts of Congress of . . . , certain lands were granted subject to restrictions against alienation for five years. The term expired and the Indians became entitled to a patent under the act, but for some reason it was not issued until after the passage of the Act of Congress of , which in terms from that date created new restrictions against alienation for twenty-five years. The court denied the application of the later act, although its language was broad enough to have included the land patented under the former law. This case is particularly worthy of consideration.

The general rule of interpretation of the statutes as applied to this case would simply be that the Act of 1902, giving power to sell, the Act of 1906, giving power to sell generally upon a condition, the condition would not take its effect for the reason that a general later affirmative law does not abrogate an earlier special one by mere implication.

Referring now to the United States Circuit Court of Appeals in the Bartlett case, the statement will be found that no authority has been brought before

the court justifying the reassertion of governmental control over the lands of an Indian citizen, after the termination of the original restrictions. Yet the Supreme Court in this case cites a large number of authorities, which in our opinion may be classified in two divisions. First: Decisions respecting the absolute power of Congress to control all of the personal affairs of any tribe of Indians, or of any of its members, prior to the time they become citizens of the United States. Under this authority, no rights of property as such may vest in the individual members of the tribe which are not subject to the action of Congress. Second: Cases in which, although citizenship has been given, yet in which timely exceptions or reservations based upon, or rather required or created during tribal dependency, remain in effect after the gift of citizenship. As to the later class of authority no question exists but that Congress may exercise plenary control over such trust fund or over restrictions during their existence. But to justify the power of Congress to create classes of citizens, and to reassert contractual censorship, after the expiration of the restrictions, would be in effect a statement that some limitation of a personal character was retained by the United States from the gift of citizenship, which is error.

As to the constitutionality of the act we cite the dissenting opinion of Judge Hardy, respectfully sub-

mitting that the Supreme Court erred. The plaintiff in error respectfully asks the court for a reversal of the cause.

Respectfully submitted,

E. A. BLYTHE,
Attorney for Plaintiff in Error.

3
Office Supreme Court, U. S.
FILED

OCT 31 1917

JAMES D. MAHER,
CLERK.

IN THE

Supreme Court of the United States

J. H. BRADER,

Plaintiff in Error,

vs.

RACHEL JAMES, *formerly*

RACHEL REEVES,

Defendant in Error.

No. 126

October term - 1917

Brief and Argument of Plaintiff in Error

D. M. TIBBETTS,

FRED W. GREEN,

Of Counsel for Plaintiff
in Error.

SUBJECT INDEX

	PAGE
Statement	1 to 3
Specification of Errors.....	3 to 4
Congressional acts in question.....	4
Brief	6 to 7
Restrictions summarized.....	6
Argument in support of brief.....	8 to 32
Intent of Congress.....	8 to 22
Power of Congress.....	22 to 29
Departmental Construction.....	29 to 30
Conclusion	31 to 32

CASES CITED

	PAGE
Adkins vs. Arnold, 235 U. S. 417.....	5
Bartlett vs. United States, 203 Fed. 410.....	7-28
Bowling vs. United States, 233 U. s. 528.....	5
Choate vs. Trapp, 224 U. S. 665.....	7-10-23
Civil Rights Cases, 109 U. S. 3.....	27
Dixon vs. Luck Land Co. 242 U. S. 271.....	29
Harrison vs. Bell 235 Fed. 626.....	31
Heckman vs. United States 224 U. S. 413.....	7-23
Hemmer vs. United States 204 Fed. 898.....	27
Holden vs. Joy 17 Wall. 211.....	7-28
Jefferson vs. Cook 155 Pac. (Okla.) 852.....	6
Jones vs. Mechan 175 U. S. 1.....	7-15-26-28
Levindale Lead Co. vs. Coloman 241 U. S. 432.....	7-19-21
Lula Seminole et al. vs. S. D. Powell, Okla., No. 6600	31
Mullen vs. United States 224 U. S. 448.....	5-9
Skelton vs. Dill 235 U. S. 206.....	5
Tiger vs. Western Investment Co. 221 U. S. 286.....	7-20-22
United States vs. Bartlett 235 U. S. 72.....	10
United States vs. First Nat'l Bank, 234 U. S. 245.....	21
United States vs. Hemmer 241 U. S. 379.....	7-17
United States vs. Sandoval 231 U. S. 28.....	29
United States vs. Waller 243 U. S. 463.....	29
Washington vs. Miller 235 U. S. 422.....	6-12
Wilson vs. Wall 6 Wall. 83.....	7-13
Younkin vs. David 235 Fed. 621.....	30-31

MISCELLANEOUS

	PAGE
Endiloch on Interpretation of Statutes, Sec. 223	6
Letter of Attorney General's Office.....	29-30

IN THE
Supreme Court of the United States

J. H. BRADER,

Plaintiff in Error,

vs.

RACHEL JAMES, *formerly*

RACHEL REEVES,

Defendant in Error.

No.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

Statement.

This is a proceeding in error brought from the Supreme Court of the State of Oklahoma to this Court by writ of error. The suit was instituted by the defendant in error, as plaintiff, on August 28th, 1912, in the District Court of Choctaw County, Oklahoma to recover from the plaintiff in error herein, defendant in the trial court, two hundred acres of real estate situated in Choctaw County. Hereafter, for convenience, the parties will be designated as in the trial court wherein the present defendant in error was plaintiff and the present plaintiff in error was defendant. To the petition the defendant filed an answer and plaintiff interposed a demurrer thereto. The demurrer was sustained by the trial court and, the defendant having elected to stand upon his

answer, judgment was accordingly entered against him in favor of the plaintiff for the recovery of said real estate. A jury was called to determine the damages for detention and fixed the amount thereof at \$250.00. Judgment was entered accordingly for that amount. (See transcript of record, pp. 19 to 20 inclusive). The facts therefore are undisputed and as shown by the pleadings, (See transcript of record, pp. 9 to 19 inclusive) are as follows: One Hundred Sixty acres of the land in controversy was the homestead allotment of Serena Wallace, a full blood Choctaw Indian, the balance of 40 acres being a portion of her so-called surplus allotment. The allotments were selected during her life time. Serena Wallace died October 27, 1905, leaving the plaintiff, Rachel James, nee Reeves, as her sole heir. On August 17, 1907, for the consideration of Nine Hundred Dollars (\$900.00) cash the said Rachel James conveyed by warranty deed all of said 200 acres to Tillie Brader, who thereafter conveyed the same to the defendant J. H. Brader and he claimed ownership of the same at the commencement of this action. After taking the aforesaid conveyance Mr. Brader expended the sum of about One Thousand Dollars in the constructions of buildings, fences and other improvements upon the premises. (See transcript of the record, page 14.) The deed from Rachel James to Tillie Brader was not approved by the Secretary of the Interior.

The plaintiff in error has abandoned his claim to the surplus allotment of forty acres, so that the issues herein involved relate only to the homestead allotment of 160 acres.

Upon appeal to the Supreme Court of the State of Oklahoma, the judgment of the trial court was affirmed in an opinion of April 18, 1915. (See transcript of the record pp. 23 to 34 incl.).

The case was then retained upon a petition for rehearing until January 11, 1916, when the petition for rehearing was

denied, all the justices concurring except Hardy J., who filed a dissenting opinion. (See transcript of record, pp. 39 to 66 inclusive.)

It was contended on the part of the plaintiff that the deed from Rachel James to Tillie Brader was void because the said Rachel James was a full blood Indian and the conveyance was not approved by the Secretary of the Interior, as she contended it should have been in order to make it valid by reason of the provisions of Section 22 of the Act of April 26, 1906. (34 Stat. at L. 137.)

On the other hand it was contended by the defendant that by virtue of the Act of July 1st, 1902, (32 Stat. at L. 641) which forbade the alienation of homestead allotments during the life time of the allottee not exceeding twenty-one years, that upon the death of the mother of Rachel James the said Rachel James immediately inherited said homestead allotment free from restrictions, and that it was neither the intention nor within the power of Congress by the enactment of Section 22 of the Act of April 26, 1906, to place restrictions upon allotments against which the restrictions had theretofore expired. He contended, therefore, that Rachel James at the time of the execution of her deed to Tillie Brader had a lawful right to make the conveyance free from all restrictions.

SPECIFICATION OF ERRORS.

The plaintiff in error contends that the Supreme Court of the State of Oklahoma erred in affirming the judgment awarding to the defendant in error the homestead allotment in controversy and damages for detention thereof for the following reasons:

FIRST:—Because by virtue of Section 12 of the Act of July 1, 1902 (32 Stat. at L. 641) all restrictions upon the alienation of the homestead expired upon the death of the mother of Rachel James, October 27th, 1905, and the same

descended to Rachel James, free from all restrictions. It was not the purpose of Congress, therefore, by Section 22 of the Act of April 26th, 1906, (34 Stat. at L. 137) to reimpose restrictions upon the sale of said real estate nor did said Act have that effect.

SECOND:—Because if the effect of said Act of April 26, 1906, was to reimpose restrictions upon said homestead allotment, said Act is unconstitutional and void for the reason that the same would result:

(a) In depriving citizens of the State of Oklahoma of certain of the privileges and immunities of the citizens of the several States, to-wit, immunity from restrictions upon the free use, control and disposition of property when acquired free from restrictions, contrary to the provisions of Section 2 of Article 4 of the Constitution of the United States.

(b) In depriving persons of their property without due process of law, contrary to the provisions of the Fifth Amendment to the Constitution of the United States, and

(c) In impairing obligations of contractual relations existing between the members of the Choctaw and Chickasaw tribes of Indians and the United States by the written agreement of July 1st, 1902, (32 Stat. at L. 641.).

THE ACTS IN QUESTION.

(Sec. 12 Act July 1, 1902.)

"Homesteads—Restrictions on Alienation. Each member of said tribes shall, at the time of the selection of his allotment, designate as a homestead out of said allotment land equal in value to one hundred and sixty acres of the average allotable land of the Choctaw and Chickasaw nations, as nearly as may be, which shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment, and separate certificate and patent shall issue for said homestead."

(Sec. 22, April 25, 1906.)

(5)

"Conveyance of Inherited Lands. Sec. 22. That the adult heir of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States court for the Indian Territory. And in case of the organization of a State or Territory, then by a proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe."

BRIEF.

The lands in controversy were allotted to Serena Wallace in accordance with a treaty or agreement between the United States and the Choctaw and Chickasaw tribes of Indians approved July 1, 1902 (32 Stat. at L. 641) by virtue of which the homestead allotment involved herein vested immediately in Rachel James, free from all restrictions, upon the death of her mother, Serena Wallace, on October 27, 1905:

Mullen vs. United States, 224 U. S. 448.

Skelton vs. Dill, 235 U. S. 206.

Adkins vs. Arnold, 235 U. S. 417.

Bowling vs. United States, 233 U. S. 528.

The agreement of July 1, 1902, under which the allotment of Serena Wallace was made, was a special act providing for allotments in severalty to the members of the Choctaw and Chickasaw tribes of Indians only. The allotments in severalty to the members of the others of the Five Civilized

Tribes were also provided for by special acts, and with reference to restrictions were in substance as follows:

CREEKS.

(Act June 30, 1902, 32 Stat. at L. 500, Sec. 16.)

1. Surplus inalienable prior to five years from date of approval of the Act except upon the approval of the Secretary of the Interior.
2. Homestead (40 acres) inalienable for twenty-one years from date of deed therefor.

CHEROKEES.

(Act July 1, 1902, 32 Stat. at L. 716, Secs. 13-14-15.)

1. Homestead (40 acres) inalienable during life time of allottee not exceeding 21 years from certificate of allotment.
2. Surplus inalienable by allottee or his heirs prior to five years from ratification of the Act, (Aug. 7, 1902.)

SEMINOLES.

(Act December 16, 1897, 30 Stat. at L. 567.)

1. Homestead (40 acres) inalienable and non-taxable in perpetuity.
2. Surplus to be deeded free of restrictions upon the termination of the tribal government.

The Act of April 26, 1906, *supra*, was a general act applying to all of the Five Civilized Tribes. There was no repeal of the former special acts by express reference and therefore the provisions of the previous special acts remained unless repealed by necessary implication:

Washington vs. Miller, 235 U. S. 422.

Endiloch on interpretation of Statutes, Sec. 223.

Jefferson vs. Cook, 155 Pac. (Okla.) 852.

The Act of April 26, 1906, *supra*, while making the restrictions in some instances more burdensome upon *allotted* lands, (c. Sec. 19) is essentially intended to relieve restrictions upon *inherited* lands (c. Sec. 22). Being prospective and permissive in terms, it should not be construed as an attempt to affect the status of lands upon which restrictions had been removed or had expired by virtue of a prior special act.

United Staes vs. Hemmer, 241 U. S. 379.

Levindale Lead Co. vs. Coleman, 241 U. S. 432.

The estate acquired by Rachel James upon the death of her mother was an estate in fee simple, free from all restrictions upon alienation by reason of contractual relations existing between the members of the Choctaw and Chickasaw Tribes of Indians and the United States by virtue of the Act of July 1, 1902 (*supra*) and therefore congress retained no power thereafter to diminish the estate or property of said Rachel James in the real estate so acquired by a later enactment.

Choate vs. Trapp, 224 U. S. 665.

Jones vs. Meehan, 175 U. S. p. 1.

Holden vs. Joy, 17 Wall. 211.

Wilson vs. Wall., 6 Wall. 83.

Bartlett vs. U. S., 203 Fed. 410.

The power of congress is limited to the extension of restrictions already existing and it cannot go so far as to impose restrictions upon lands against which none existed at the time of the Act.

Tiger vs. Western Investment Co.

221 U. S. 286.

Heckman vs. United States, 224 U. S. 413.

Choate vs. Trapp, *supra*.

Bartlett vs. U. S., *supra*.

ARGUMENT.

From the foregoing it will be seen that an attempt is made in this action by Rachel James, plaintiff in the trial court, to set aside and nullify a deed which she had given for a valuable consideration and recover the land back for herself, without any offer to return the consideration received, and to recover damages or rental on account of the detention of the property. All this is sought in an action in the nature of a suit in equity, notwithstanding the fact that the defendant had expended about \$1,000.00 in making improvements upon the property, which necessarily revert to the plaintiff if she is successful in her suit. It is therefore a case which does not appeal strongly to the conscience of a chancellor, and under the well settled principles of equity jurisprudence the plaintiff herein should not be permitted to recover unless her right to do so is clear.

The legal questions involved quite naturally resolve themselves into two general divisions, as follows:

FIRST:—Did Congress intend by or was it the effect of the Act of April 26, 1906, *supra*, to place all full blood Indian heirs, as well as those theretofore unrestricted as those theretofore restricted, under the supervisory care of the Secretary of the Interior in such way as to make conveyance of their inherited lands invalid unless approved by him?

SECOND: If such was the purpose of Congress, did Congress have the power to accomplish this purpose?

I.

Was it intended by Congress by the Act of April 26, 1906, to impose restrictions upon the alienation of lands against which no restrictions existed at that time?

It is our understanding that it will be conceded, for it is certainly settled law, that Rachel James took the homestead allotment in question at the time of her inheritance on Octo-

ber 27, 1905, free from all restrictions and this by virtue of the provisions of Section 12 of the Act of July 1, 1902, *supra*.

Mullen vs. United States, 224 U. S. 448.

As heretofore pointed out, the above mentioned act is a special one dealing solely with the affairs of the Choctaw and Chickasaw Tribes of Indians and was in the nature of an agreement or treaty between those tribes of Indians and the Government of the United States. It is to be assumed therefore that the United States took into account the industry, intelligence and general condition of these particular Indians and proceeded advisedly in framing the portions of the Act relating to restrictions upon the alienation of the lands to be allotted, as well as in the other matters provided for in this treaty, and by an examination of the treaty it will be found that it goes into great detail with the apparent object of fully providing for the establishment of homes and securing the future welfare of the members of those tribes. This could obviously be more completely and intelligently accomplished in a treaty dealing with the members of a single tribe or of allied tribes, as in the case of the Chickasaw and Choctaw tribes, than an act or treaty which attempted to legislate generally for all Indian tribes within the United States or a class of tribes such as the so-called Five Civilized Tribes. In this connection, it should be remembered that the Chickasaw and Choctaw tribes of Indians in the matter of legislation concerning their lands, constitute only one tribe.

There is also reason to suppose that since the provision under consideration is a treaty stipulation, the members of the tribes affected, adopted and ratified the treaty advisedly with the expectation that it would be respected by the United States.

Under these circumstances then, Section 12 of the aforesaid Act went into effect as a special act dealing with a particular tribe of Indians, and by virtue of which the home-

stead allotment provided for was declared to be inalienable during the life time of the allottee, not exceeding twenty-one years from the date of the certificate of allotment, which meant (as stated in *Mullen vs. United States*, supra) that upon the death of the allottee her homestead allotment passed to her heirs free from restrictions. The restrictions were so removed to the same extent and with like effect as though it had been done by an affirmative act of congress at the time. See

United States vs. Bartlett 235 U. S. 72.

Choate vs. Trapp, supra.

If Rachel James as such heir had made her conveyance immediately upon her inheritance on October 27, 1905, or at any time thereafter prior to the taking effect of the Act of April 26, 1906, it would not now be contended by any one that her conveyance was not valid.

Was it the intention of Congress by Section 22 of the Act of April 26, 1906, supra, to impose restrictions upon this class of land which at the time of the passage of said act was free from restrictions? That act was one of a general character, intended to apply to all of the Five Civilized Tribes, as shown by its title: "An Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory and for other purposes."

It is well to bear in mind that at the time this Act went into effect the period of restriction existing against the alienation of the *allotted* lands of full blood members of these tribes had not expired, and therefore by virtue of Section 19 of that Act, Congress undertook to and did extend the period of restrictions against the alienation of allotted lands by full blood Indians of all the Five Civilized Tribes to a period of twenty-five years, so that all full blood members of these tribes were effectually protected as to the lands secured by them through *allotment* by the provisions of Section 19. Ref-

erence to the brief summary of the period of restriction existing against alienation of the various tribes as shown on page six of this brief will indicate that by far the greater portion of the *inherited* land as well as the *allotted* land still remained restricted at the time of the passage of the Act of April 26, 1906, *supra*, and it was therefore evidently the purpose of Congress, in view of the restrictions which it was continuing upon the allotted lands of full blood Indians, to relieve the restrictions somewhat as to inherited lands,—possibly upon the theory, as has been stated in several instances by this Court, that an Indian is ordinarily well provided for so far as the ownership of land is concerned, by the allotted land which he was entitled to receive. In the Choctaw and Chickasaw tribes, for instance, each member by blood was entitled to receive a homestead allotment of 160 acres and a surplus allotment of the same amount; so that if he inherited further land on account of the death of a relative, he would be better provided for if he could dispose of the land thus inherited and use the money for the improvement of his allotted land rather than to have a great amount of land with no means to improve it. Such are the reasons which might well and probably did address themselves to Congress as sufficient to justify some relief from the restricted condition theretofore existing in most of the tribes as to inherited as well as the allotted land. Such a construction of Section 22, *supra*, is in harmony with reason and would not require that the section should be construed so as to affect the inherited lands against which no restrictions existed at the time, but only to affect lands which were in need of such legislation because of arbitrary restrictions still existing against them.

Such a construction would also conform to the principles universally applied when construing the effect of a general Act upon a previous special one. As said in *Endiloch on Interpretation of Statutes*, *supra*:

"A general later affirmative law does not abrogate an earlier special one by mere implication * * * The law does not allow the exposition to alter or revoke by construction of general words any particular statute, where the words of the two acts as compared with each other are not so glaringly repugnant and irreconcilable as to indicate a legislative intent to repeal, but may have their proper operation without it. It is presumed to have only general cases in mind and not particular cases which have already been otherwise provided for by the special law."

In *Washington vs. Miller*, 235 U. S. 422, the court had under consideration the effect of a general Act, to-wit, the Act of April 28, 1904, upon a prior special Act, it being the Act of March 1st, 1901. The prior Act which applied only to the Creek tribe of Indians, provided that the rule of descent and distribution in that Nation should be in accordance with the statutes of the State of Arkansas, except that it was provided that only citizens of the Creek Nation and their descendants should inherit lands of the Creek Nation. The later Act provided generally that the laws of the State of Arkansas should be continued in force and extended in their operation so as to embrace all persons and estates in said territory, whether Indian, freedmen or otherwise.

In determining whether or not the laws of inheritance of the State of Arkansas should control the descent of property in the Creek Tribes so as to give the same to a non-citizen member or whether the rules of inheritance of the Creek Tribe to the extent of disposing of the property to a member of that Tribe under the special Act above referred to would control, the court on this subject at page 428 says, speaking first of the later Act:

"In short it was plainly a general statute and did not show that the attention of Congress was then particularly directed to the descent of the lands of the Creeks. On the other hand Section 6 of the Supplemental Agreement

and its two provisos dealt with a subject in specific and positive terms which made it certain that the Creeks and their lands were particularly in mind at the time * * *

"No doubt there was a purpose to extend the operation of the Arkansas laws in various ways, but we think it was not intended that they should supersede or displace special statutory provisions enacted by Congress with particular regard for the Indians whose affairs were peculiarly within its control. *Taylor v. Parker*, ante p. 42. See also in *re Davis' Estate*, 32 Oklahoma, 209."

The situation in the case just cited is almost identical with that in the present case. The principle that the General Act should not be construed to include cases otherwise provided for by the earlier Special Act unless the two Acts are directly in conflict with each other, is stated by the court in the following language at pages 427 and 428.

"There is no doubt that, if taken literally, it would subject the Creek lands to the Arkansas law of descent and distribution without any qualification or restriction. But this would be only by reason of the generality of its terms, for it made no mention of that law or of those lands."

So in the present case, the Act of April 26, 1906, if taken literally, requires all conveyances by full blood Indians to be approved by the Secretary of the Interior, but such a situation arises only by reason of the generality of its terms and not because the later General Act was actually directed to cases of this character.

The case of *Wilson vs. Wall*, supra, is an early case involving certain of the lands of the Choctaw tribe of Indians. Under a treaty made with said tribe of Indians in 1830 it was provided that each Choctaw head of a family indicating his desire to remain and become a citizen of the United States should be entitled to a reservation of one section of 640 acres of land and also entitled to one-half of that

quantity for each unmarried child living with him, etc., to adjoin the location of the parent. It was the custom until 1842 to issue patents to the parent, not only for the reservation provided for himself but also those provided in behalf of each child. Acting upon that custom and anticipating the securing of his patent, William Hall, who was a Choctaw Indian of the class specified, granted his reserve and that of his children to one Wilson in 1836 and patents were thereafter issued to Hall in 1841. In 1842 Congress passed an Act directing that as to lands located for Choctaw children the patent issue to such Indian child if living and if not living to his heirs and representatives. In view of this later Act, the heirs of William Hall commenced suit in 1849 to recover back the reservations patented on their behalf. In discussing the effect of the later Act upon the previous Act and the departmental construction thereof, relied upon by plaintiff, this court said:

"Now, while it is freely conceded that this construction given to the treaty should form a rule for the subsequent conduct of the department, it cannot affect titles before given by the government, nor does it pretend to do so."

Such was the construction given the Acts above involved notwithstanding the fact that a construction certainly as permissible, so far as the language of the Acts is concerned, would have taken the property away from the purchaser and given it back to the heirs of William Hall, but as a reason for not doing this the court further says, at page 90:

"The fact is clear that such was not the construction under which the grantor gave the deed or the grantee accepted it. A chancellor will not be astute to charge a constructive trust upon one who has acted honestly and paid a full and fair consideration without notice or knowledge."

The case of Jones vs. Meehan, *supra*, involved the construction of certain treaties and acts relative to the Chippewa tribe of Indians in Minnesota. On October 2nd, 1863 the United States entered into a treaty with members of this tribe providing that the United States "shall grant" to a certain class of members a homestead of 160 acres within specified limits, the boundaries to be adjusted in conformity with official surveys. It was also provided that no assignments should be made of any right or interest in said allotments until patent shall issue and that no patent should issue until due proof of five years actual residence and cultivation has been made. The treaty also provided that "upon the urgent request of the Indians, parties to this treaty, there shall be set apart from the tract hereby ceded a reservation of 640 acres near the mouth of Thief River for the chief Moose Dung," etc.

Chief Moose Dung selected his location by word of mouth at the conference. He resided upon the tract selected until 1872 when he was succeeded by his son Moose Dung, the younger. In 1891, Moose Dung the younger made a lease of certain shore rights along his premises for a period of ten years to James and Patrick Meehan for an annual rental of \$25.00. Previous to that time the Interior Department had directed the Indian officers to

"take necessary steps for the protection of the lands so reserved for the benefit of those entitled as contemplated by the treaty stipulations;"

and it seems that the land in controversy in the case had been surveyed, set off and described as "Moose Dung Reservation." Thereafter, in 1894, Moose Dung the younger previous to the expiration of his former lease made another lease of shore rights to the defendant, Ray W. Jones, and on August 4th of that year Congress passed a joint resolution authorizing the Secretary of the Interior to "approve, if in his dis-

cretion he deems the same proper and advisable and upon such terms as he may impose" this lease to the defendant Jones. The question therefore arose as to the effect of the Act of Congress of 1894 upon the Meehan lease.

In a lengthy and thoroughly considered opinion the court reached the conclusion that Moose Dung younger had received a tract of land which he had power to alienate and that the Act of Congress passed in 1894 did not have the effect of invalidating the lease made in 1891 to the Meehans, and on this subject the court held that upon the death of Chief Moose Dung his property passed to his son, Moose Dung the younger, and that the leasehold interest in the land

"passed by the lease executed by the latter in 1891 to the plaintiffs for the term of that lease; and their rights under that lease could not be divested by any subsequent action of the lessor, or of Congress, or of the Executive Departments. The construction of treaties is the peculiar province of the judiciary; and, except in cases purely political, Congress has no constitutional power to settle the rights under a treaty, *or to affect titles already granted by the treaty itself.*"

In addition to the general observations above made, attention should be called to the fact that Section 22 of the Act of April 26, 1906, does not provide broadly that the conveyance of all full blood heirs shall be subject to the approval of the Secretary of the Interior, but the language of that portion of the Section in question is as follows:

"All conveyances *made under this provision* by heirs who are full blood Indians are to be subject to the approval of the Secretary of the Interior under such rules and regulations as he may prescribe."

The wording of the section is therefore guarded, as though Congress was mindful that words of general import might be contended to cover cases which were not in fact

in the mind of Congress. As we have suggested, the evident purpose of this Act was to relieve rather than to make more burdensome the restrictions upon the inherited lands, and the words "made under the provisions of this Act" were no doubt used advisedly so as to make it clear that Congress intended to affect only the conveyances which were clearly affected by the Act, and the terms of the Act are prospective rather than retroactive.

A case similar in many respects to the one under consideration is that of *United States vs. Hemmer*, *supra*, which was brought to this court from the Circuit Court of Appeals for the 8th Circuit. The first Act, passed in 1875, gave the benefit of the ordinary homestead laws to Indians who might abandon their tribal relationship and avail themselves in the usual way of the homestead laws, providing, however, a restriction of five years upon the alienation of lands so homesteaded.

One Taylor, a Sioux Indian, on June 10, 1879, entered upon 160 acres of land in reliance upon said Act. Therefore, on June 10, 1884, he had resided thereon the required length of time to entitle him to make final proof and receive his patent but he had not actually received the same. On July 4, 1884, less than a month thereafter, an Act was passed somewhat enlarging the class of Indians who might avail themselves of the homestead Act but providing a twenty-five year restriction instead of a five year restriction upon alienation. The contention was that this later Act had the effect of extending the twenty-five year restriction upon the land homesteaded by Taylor, which had been subsequently conveyed to Hemmer, after the passage of the Act of July 4, 1884.

The Circuit Court of Appeals based its decision largely upon the want of power in Congress to place an additional burden upon Taylor's property, if that should be conceded to be the effect of the Act; but this court preferred, without in

any respect expressing disapproval of the reasons assigned by the Circuit Court of Appeals, to affirm its decision upon the ground that there was no necessary repugnancy between the two acts. After calling attention to the fact that the Act of 1875 did not apply to Indians generally but had special application to those possessing certain qualifications and who had separated themselves from their tribes to become citizens and that the Act of 1884 is general in its character and has criteria of application different from that of the Act of 1875, this court said:

"Therefore, the Acts had no repugnancy but had different fields of application, and this, it might be contended, even considering their future operation. Of this however we can not express opinion. The Act of 1884 applied to Indians then located on the public lands. Regarding Taylor simply as an Indian those words might be considered to be applicable to him; regarding the purpose of the act, which was to confer a benefit, not confirm one, they did not apply to him or to Indians in his situation, for he, and Indians such as he, were the beneficiaries of the prior act and he and other Indians, it may be,—but certainly he—had substantially performed its conditions. What remained to be done and could have been done before the act of 1884 was passed, was not much more than ceremony."

The court in that case pursued the question even further, pointing out that Taylor, just as the Indian involved in this case, did not need the act of 1884 to grant the privilege of free alienation:

"Taylor and those in like situation did not need the aid of the act of 1884. Its language was not of confirmation of rights but was permissive and prospective and related to the initiation and acquisition of rights by a different class. And having this definite purpose, it would be difficult to suppose that, besides, rights acquired under prior laws were intended to be limited without reference to such laws."

It was therefore held that the conveyance made by Taylor, after the restriction imposed by the act of 1875 had expired but long before the expiration of the limitation fixed by the act of 1884, was valid.

The case of Levindale Lead Company vs. Coleman, *supra*, is instructive as indicating the rule adhered to by this court in determining the effect of legislative acts upon Indian lands. That case involved the validity of a conveyance of lands situated in the Osage Nation in Oklahoma. The Act of June 28, 1906 provided that "each member of said tribe" should be entitled to select both homestead and surplus allotments, the former to be inalienable until otherwise provided by Congress and the latter being inalienable for a period of twenty-five years except under certain circumstances provided in the act. Section 6 of the act provided that the lands and other properties of any deceased member of said tribe should descend to his legal heirs according to the laws of the state of Oklahoma, and by Section 7 it is provided:

"That the lands herein provided for are set aside for the sole use and benefit of the individual members of the tribe entitled thereto, *or to their heirs*, as herein provided; and said members, *or their heirs*, shall have the right to use and to lease said lands for farming, grazing, or any other purpose not otherwise specifically provided for herein, * * * and provided further, That all leases given on said lands for the benefit of the individual members of the tribe entitled thereto *or for their heirs* shall be subject only to the approval of the Secretary of the Interior."

The case involved the validity of a conveyance by Charles Coleman of land inherited by him from his Indian wife, Charles Coleman not being of Indian blood. The only question presented was whether or not restrictions imposed upon members of the tribe should apply as well to their heirs who were not of Indian blood. The court in stating the rule of construction to be observed said:

"The provisions of the Allotment Act must be construed in the light of the policy they were obviously intended to execute."

and it is further said:

"But the fact that the non-member takes in the right of the deceased member is not enough to subject him to restrictions which are plainly imposed for the protection of members. It is urged that the restrictions, by virtue of their terms, were to run with the land until they expired by limitation or were removed (*Bowling v. United States*, 233 U. S. 528), but restrictions would not run with the land unless they had attached. And, even where they had attached, they would run only according to the intentment of the statute. We find no indication of an intent that they should apply to lands, or an interest in lands, which had come lawfully into the ownership of white men who were non-members of the tribe."

In *Tiger vs. Western Investment Company*, supra, this court made it plain that it was not ready to construe the act of April 26, 1906 as intending to or lawfully having the effect of imposing restrictions upon land against which none existed at the time, but carefully based its decision in that case upon the fact that as to the lands involved the restrictions still remained, and held that *while that condition existed* Congress had the right to provide that they should continue for a longer period than that formerly provided. On this point the court said:

"Upon the matters involved, our conclusions are that Congress has had at all times and now has the right to pass legislation in the interest of the Indians as a dependent people; that there is nothing in citizenship incompatible with this guardianship over the Indian's lands inherited from allottees as shown in this case; that in the present case when the act of 1906 was passed, the Congress had not released its control over the alienation of lands of full-blood Indians of the Creek Nation; that it was within the power of Congress to continue to re-

strict alienation by requiring, as to full-blood Indians, the consent of the Secretary of the Interior to a proposed alienation of lands such as are involved in this case; that it rests with Congress to determine when its guardianship shall cease, and while it still continues it has the right to vary its restrictions upon alienation of Indian lands in the promotion of what it deems the best interest of the Indian."

This rule of construction is also approved by this court in *Heckman vs. United States*, *supra*, and it is apparently based principally upon the theory that the restrictions which were continued affected the land rather than the person owning the same, for as said in the case of *Levindale Lead Company vs. Coleman*, *supra*, the restrictions may or may not be personal.

In the *Tiger* case the restriction still remained upon the land and therefore was subject to extension. In the instant case the restriction clearly was personal upon the allottee of the land in question and by the very terms of the act under which the restrictions were imposed expired upon the death of the allottee, so that it left the land entirely free from restrictions and therefore without any power on the part of Congress to place restrictions thereon at that time. Since the act of July 1st, 1902 evidenced a treaty relationship between the government and the Choctaw and Chickasaw tribes of Indians, therefore the rights fixed by virtue of that treaty cannot be disturbed by Congress and should not be construed to do so. This rule of interpretation was evidently in the mind of this court in deciding the case of *United States vs. First National Bank*, 234 U. S. 245, where an act of Congress, not a treaty or contractual instrument, was under consideration and the case turned upon the construction of the words "mixed blood Indians." The Court said:

"But the legislation here in question is not in the nature of contract and contains no provisions that makes

it effectual only upon consent of the Indians whose rights and privileges are to be affected. Evidently this legislation contemplated in some measure the rights of others who might deal with the Indians, and obviously was intended to enlarge the right to acquire as well as to part with lands held in trust for the Indians."

The above language might be very aptly applied to both acts of Congress under consideration in this case, and would indicate that since the earlier act was of a contractual character the rights obtained by the Indians thereunder were not subject to disturbance by later acts of Congress without their consent; and also that the later act, being one evidently intended to enlarge the right to dispose of lands, should be liberally construed with that end in view.

II.

If it was the purpose of Congress to impose restrictions upon this land, did Congress have power to accomplish this purpose?

This court in dealing with similar questions has so far been careful to limit its construction of the powers of Congress to cases where the restrictions yet remained and the question was as to the power of extending such restrictions. This is particularly true of the case of *Tiger vs. Western Investment Company*, supra, where the court particularly calls attention to the fact that the period of restriction upon the land in controversy had not expired at the time of the passage of the act of April 26, 1906, in this connection saying:

"It is thus apparent that the five year limitation created by Section 16 of the act of 1902 upon the alienation of lands by the Creek Indians had expired when the conveyance in controversy was made, *but within that five years and about fifteen months before the expiration thereof Congress passed the Act of 1906.*"

Also in the case of *Heckman vs. United States*, *supra*, the same reasoning is applied in the following language:

"The power of Congress thus to extend the restrictions upon alienation was sustained by this court in *Tiger v. Western Investment Co.*, 221 U. S. 286. There the question related to a conveyance of inherited lands, made by a Creek Indian, of the full-blood, without the approval of the Secretary of the Interior as required by Sec. 22 of the act of 1906. The conveyance had been executed after the expiration of the five-year limitation upon alienation, prescribed by the supplemental agreement with the Creek Nation (act of June 30, 1902, c. 1323 Sec. 16; 32 Stat. 503); but meanwhile, and during the continuance of the *original restriction* the act of 1906 had been enacted. It was held that the restriction of the later statute was valid."

In that case the court further said:

"During the continuance of this guardianship, the right and duty of the Nation to enforce by all appropriate means the restrictions designed for the security of the Indians cannot be gainsaid."

The binding force of relations of a contractual character even with the Government of the United States is yet more forcibly brought out in the case of *Choate vs. Trapp*, *supra*, in which case the court had under consideration the effect of the act of Congress of May 27, 1908, (35 Stat. 312) upon the taxability of lands of the Choctaw and Chickasaw Indians while the title remained in the original allottee. The act of June 28, 1898 (30 Stat. 505) had provided for the allotment to these Indians of their lands with the provision that they should remain non-taxable while the title remained in the original allottee, and this irrespective of the degree of blood of the Indian. The act of May 27, 1908, removed restrictions upon conveyances as to Indians of certain degrees of blood and then provided that all lands upon which restrictions had been removed should be subject to taxation. It was contended

that by virtue of the prior act the Indians had obtained a valuable property right, to-wit, exemption from taxation, which Congress could not arbitrarily take away without the consent of the Indians. This point was sustained by this court and in that connection the following language is used by Mr. Justice Lamar in announcing the opinion of the court, see pp. 671-72:

"The individual Indian had no title or enforceable right in the tribal property. But as one of those entitled to occupy the land he did have an equitable interest, which Congress recognized and which it desired to have satisfied and extinguished. The Curtis act was framed with a view of having every such claim satisfactorily settled. And though it provided for a division of the land in severalty, it offered a patent of non-taxable land only to those who would relinquish their claim in the other property of the Tribe formerly held for their common use. For the Atoka Agreement, after declaring that 'all land allotted should be non-taxable,' stipulated further that each enrolled member of the Tribes should receive a patent framed in conformity with the Agreement, and that each Choctaw and Chickasaw who accepted such patent should be held thereby to assent to the terms of this Agreement and to relinquish all of his right in the property formerly held in common.

"There was here, then, an offer of non-taxable land, acceptance by the party to whom the offer was made, which, with the consequent relinquishment of all claim to other lands furnished a part of the consideration, if, indeed, any was needed, in such a case, to support either the grant or the exemption. *Wisconsin etc., R. R. vs. Powers*, 191 U. S. 379-386; *Home vs. Rouse*, 8 Wall. 430-437; *Tomlinson vs. Jessup*, 15 Wall. 454-458. Upon delivery of the patent the agreement was executed, and the Indian was thereby vested with all the right conveyed by the patent, and, like a grantee in a deed poll, or a person accepting the benefit of a conveyance, bound by its terms, although it was not actually signed by him. *Keller vs. Ashford*, 133 U. S. 610-621; *Hendrick vs. Lindsay*, 93 U. S. 143.

"As the plaintiffs were offered the allotments on the conditions proposed; as they accepted the terms, and, in the relinquishment of their claim, furnished a consideration which was sufficient to entitle them to enforce whatever rights were conferred, we are brought to a consideration of the question as to what those rights were," etc.

In that case it was further said:

"There have been comparatively few cases which discuss the legislative power over private property held by the Indians. But those few all recognize that he is not excepted from the protection guaranteed by the Constitution. His private rights are secured, and enforced to the same extent and in the same way as other residents or citizens of the United States. * * * His right of private property is not subject to impairment by legislative action, even while he is, as a member of a tribe and subject to the guardianship of the United States as to his political and personal status."

And in discussing the effect of the decision in *Tiger vs. Western Investment Company*, *supra*, it was said:

"Nothing that was said in *Tiger v. Western Investment Company* (citing it) is opposed to the same conclusion here. For that case did not involve property rights, but related solely to the power of Congress, to extend the period of the Indian's disability. The statute did not attempt to take his land or any right, member or appurtenance thereunto belonging. It left that as it was."

And after stating the rule that citizenship was compatible with guardianship, it is further said:

"But there was no intimation that the power of wardship conferred authority on Congress to lessen any of the rights of property which had been vested in the individual Indian by prior laws or contracts. Such rights are protected from repeal by the provisions of the Fifth Amendment.

"The constitution of the State of Oklahoma itself expressly recognizes that the exemption here granted must be protected until it is lawfully destroyed. We have seen that it was a vested property right which could not be abrogated by statute.

The court also said referring to the decision in the case of Jones vs. Meehan, *supra*, that the subsequent act could not relate back so as to interfere with the right of property which the Indian possessed and conveyed as an owner in fee and that while Congress had power to make treaties, it could not affect titles already granted by the treaty itself. Applying this principle to the instant case, it follows that Rachel James, having, upon the death of her mother in October 1905, become vested with title in fee, was entitled to the same protection as any other citizen of the United States. Her Indian blood was of no consequence. If congress thereafter intended to place restrictions upon her alienation of the land it thereby impaired vested property rights held by her.

Property in land must necessarily include the right of disposition as well as of ownership and what is comprehended in the term "property" is well put in the dissenting opinion in this case by Mr. Justice Hardy, as follows:

"The term 'property' has a most extensive significance, and according to its legal definition, consists in the free use, possession, enjoyment and disposition by a person of all his acquisitions, without any control or diminution save only by the laws of the land. The term not only includes the thing over which dominion may be exercised, but in its broader sense is that dominion or right of use and disposition which one may exercise over subjects or things, to the exclusion of others, and includes the right to possess, use, enjoy and dispose of a thing; and it is hard to conceive of property without these rights and attributes therein."

Therefore, to take away one of the attributes of the property is tantamount to taking away the property itself or some portion thereof.

The right of every citizen of the United States to be protected in his property rights is stated in the Civil Rights Cases, 109 U. S. 3. It was there said that Congress by passing the act under consideration undertook

"to secure to all citizens of every race and color and without regard to previous servitude those fundamental rights which are the essence of civil freedom, the right to make and enforce contracts, to sue, be parties, give evidence and to inherit, purchase, lease, sell and convey property as is enjoyed by white citizens."

In Hemmer vs. United States as reported in 204 Federal 988, being the decision of the Circuit Court of Appeals of the 8th Circuit, previous to review of that case by this court, the position was taken that the rights of the Indian, Taylor, in that case, were of a contractual character because of his having taken his land in reliance upon the law of 1875, and, having done all that was required of him to do in order to secure title free from restrictions upon alienation, Congress could not thereafter impose further restrictions, just as in this case it is contended that since the treaty arrangement of 1902 contained provisions under which Rachel James took title to the land in controversy herein, free from restrictions, Congress could not thereafter by an arbitrary provision take away from her those attributes of property involving free alienation. The Circuit Court of Appeals on this subject said:

"A construction which would apply the restriction of that act to the previous offer to and contract with Taylor and change them into an offer and contract for the land subject to a restriction on alienation for 25 years necessarily gave the act of 1884 a retrospective and mandatory effect, while its terms are prospective and permissive only * * * A construction which gives a statute

a retrospective effect should never be adopted unless it appears clearly and unequivocally that the legislative body enacted it with the intention to produce that effect.

The Circuit Court of Appeals also in the case of Bartlett vs. United States, 203 Federal 410, speaking to the point of the power of Congress to impose restrictions upon Indian lands where restrictions have theretofore expired, in disposing of a contention that the act there in question in terms provided that it did not apply to lands against which restrictions had previously expired, said:

"It is unnecessary for us to pass upon the correctness of this statement, however, for we are of the opinion that it was not the intention nor within the power of Congress to reimpose a restriction on the alienation of lands against which none at the time existed."

This court in the case of Holden vs. Joy, 17 Wall. 211, said of the power of Congress over treaty rights:

"On the contrary there are many authorities where it is held that a treaty may convey to a grantee a good title to such lands without an act of Congress conferring it, and that Congress has no constitutional power to settle or interfere with rights under treaties, except in cases purely political."

This limitation is also forcibly stated in the later case of Jones vs. Meehan, supra, at page 32.

"The construction of treaties is the peculiar province of the judiciary; and, except in cases purely political Congress has no constitutional power to settle the rights under a treaty, or to affect titles already granted by the treaty itself. Wilson v. Wall. 6 Wall. 83, 89, Reichart v. Felps, 6 Wall. 160; Smith v. Stevens, 10 Wall. 231, 327; Holden v. Joy, 17 Wall. 211, 247."

The cases above mentioned all involve the rights of property in Indian allotments under the various acts of Congress presented for construction by this court and aptly apply to

the situation in this case, and the decisions of this and other courts to the effect that treaties affecting private rights, even tho with Indian Tribes may not be repudiated by Congress, warrant the position that Congress may not take away vested rights of persons, merely because they are of Indian blood. As instructive upon the questions thus far discussed we also call attention to the following recent cases decided by this court.

Dixon vs. Luck Land Co. 242 U. S. 271.

United States vs. Waller 243 U. S. 463.

Departmental Construction.

This court has in many instances indicated that it will adhere to a reasonable interpretation placed upon acts relating to Indian lands by the Department of the Interior which is charged with the administration of these laws and regulations. This is stated of the case of United States vs. Sandoval, 231 U. S. 28, where the court quotes from the case of United States vs. Holiday 3 Wall. 401, as follows:

"In reference to matters of this kind, it is the rule of this court to follow the executive and other political departments of the government whose more special duty it is to determine such affairs."

In this connection we desire to call attention to the fact that as long ago as January 29, 1907, which was prior to the execution of the deed from Rachel James to Tillie Brader, being the conveyance in question in this case, the Department of the Interior adopted a construction in line with the contentions heretofore set out, pursuant to advice from the office of the Attorney General. This advice is contained in a letter written by Honorable Frank M. Campbell, Assistant Attorney General under the above date, directed to the Secretary of the Interior. Concerning the construction of Section 22 of the Act of April 26, 1906, he said:

"This Section provides the manner in which sales may be made, notwithstanding any restrictions upon alienation and seems to apply to the heirs of all deceased allottees without regard to quantum of Indian blood; it can not, however, be held to apply to heirs who receive their inheritance freed of all restrictions. There would have been no occasion for this provision or field for its operation if the same provision that relates to Homesteads had extended to the other or surplus allotted lands. The provision as to the surplus lands of the Choctaws and Chickasaws in the Act of July 1st, 1902, *supra*, is that they may be alienated one-fourth in acreage in 1 year; one-fourth in 2 years; and the balance in 5 years from the date of the patent. There is no permissible construction of said Section 22 except that it applies, so far as the Choctaws and Chickasaws are concerned, to these surplus lands, which descend to the heirs burdened with the restrictions upon alienation, and not to the Homestead which descends to the heirs freed of all such restrictions.

"If this be the proper construction of these laws this department has no jurisdiction over the sale of lands thus held by an Indian freed of restrictions and no function to perform in connection therewith. Believing that no other construction is permissible, I am of the opinion and so advise you, that the law does not require any action on your part in this matter."

With this rule existing in the Department of the Interior upon the advice of the Attorney General's office, and in view of its obvious reasonableness as indicated by the terms of the Acts involved, we believe plaintiff in error in this case was thoroughly justified in acting upon that interpretation and taking the conveyance in question.

We also desire to call attention to the fact that the above construction has been placed upon these Acts not only by the Circuit Court of Appeals as above suggested, but also by the United States District Court for the Eastern District of Oklahoma, as evidenced by the case of *Younkin vs. David* 235 Fed.

621; Harrison vs. Bell 235; Federal 626, and other cases, so that up to this time the Supreme Court of the State of Oklahoma stands alone in the construction of the Acts as indicated in its opinion in this case. Attention is also called to the fact that Mr. Justice Hardy filed a dissenting opinion in this case, and his views are now concurred in by two other members of the supreme court as now constituted as is shown by the case of Lula Seminole et al. vs. S. D. Powell No. 6600 decided July 31, 1917, but not yet officially reported.

CONCLUSION.

It is our conclusion, therefore, in the light of the authorities and rules of construction hereinbefore discussed that the conveyance from Rachel James to Tillie Brader was valid although made without the approval of the Secretary of the Interior, for the following reasons:

First: Because it was not intended by Congress by Section 22 of the Act of April 26, 1906 to require approval of conveyances by full blood Indians against which no restrictions existed at the time of the passage of that act.

Second: Because the grantor of the land in controversy in this case secured property rights under the treaty stipulation approved by the Act of July 1st, 1902, upon the death of her mother, which Congress had no power to take from her;

Third: Because the conveyance in question in this case was in accordance with the construction placed upon the Acts in question by the legal advisor of the Department of the Interior.

We contend therefore that the decision of the Supreme

(32)

Court of the State of Oklahoma should be reversed and that judgment should be entered in favor of the plaintiff in error at the cost of the defendant in error.

Respectfully submitted,

D. M. TIBBETTS,
FRED W. GREEN,
Of Counsel for Plaintiff
in Error.

47
U.S. Supreme Court, D. C.

FILED

JAN 7 1918

JAMES D. MANER,

CLERK.

IN THE

Supreme Court of the United States

H. BRADER,

Plaintiff in Error,

vs.

RACHEL JAMES, formerly

RACHEL REEVES,

Defendant in Error.

No. 126—October
Term, 1917.

Reply Brief of Plaintiff in Error

D. M. TIBBETTS,

FRED W. GREEN,

Of Counsel for Plaintiff
in Error.

IN THE

Supreme Court of the United States

J. H. BRADER,

Plaintiff in Error,

vs.

RACHEL JAMES, *formerly*

RACHEL REEVES,

Defendant in Error.

No. 126—October
Term, 1917.

REPLY BRIEF OF PLAINTIFF IN ERROR.

The outstanding features of the brief of Defendant in Error appear to be two in number. It is contended substantially:

First—That a literal construction of Section 22 of the Act of April 26, 1906, as well as the purposes had in view by Congress in the enactment thereof, lead necessarily to the conclusion that lands of the character involved in this case were intended by Congress to be included in the restrictions contained in that Act.

Second—That of the relation between the government of the United States and the Indian in the nature of that of

guardian and ward alone, is sufficient not only to empower Congress to extend restrictions already existing but to reach out and place restrictions upon lands theretofore unrestricted.

We believe the above is a fair statement of the propositions chiefly relied upon by the Defendant in Error, and it certainly does not overstate the propositions which must be established in order to uphold the decision of the Supreme Court of the State of Oklahoma in this case.

Ancillary to the main propositions it is also contended by the Defendant in Error that the provision contained in Section 22 of the Act of April 26, 1906 requiring approval by the Secretary of Interior of conveyances by full-blood Indians made under the provisions of that Act is only a formality and not in a proper sense a restriction. A sufficient answer to that would seem to be that such a provision has always been spoken of by the courts as a restriction. It is not like a provision for the acknowledgment of a deed or the witnessing of a will. These Acts are mere formalities for the reason that there is no discretion on the part of the person performing the formalities and it even differs materially from statutory provisions prohibiting the husband or wife from conveying their homestead property without the joinder of the other, for in such a case both parties have an interest or ownership in the homestead. The requirement of approval by the Secretary of Interior places it within the discretionary power of that officer, who has no proprietary interests to say whether or not the owner of the land shall be permitted to sell it. It is a restriction in the strictest sense of the word, and it is a play on words to contend otherwise.

We now turn to the main points under consideration.

FIRST.

That a literal construction of Section 22 of the Act of April 26, 1906, as well as the purposes had in view by Congress in the enactment thereof, lead necessarily to the conclusion that lands of the character involved in this case were intended by Congress to be included in the restrictions contained in that Act.

If every word contained in Section 22 is taken at its literal meaning, a careful analysis of that section conclusively shows that it was not intended to cover lands of the class involved in this suit. It has been pointed out and indeed it is conceded in the brief of the Defendant in Error that all restrictions upon this land expired almost a year prior to the passage of the Act of April 26, 1906, so that no legislation was necessary to give the right to the Defendant in Error to alienate the land. Section 22 would have no field for operation as to land of this character. It cannot be assumed that Congress was doing an absurd thing in the way of granting a limited right of alienation upon land which could already be alienated without limitation. As pointed out in our original brief, a large portion of the inherited land of the five civilized tribes was restricted land, so that Section 22 had a purpose in that it permitted the alienation of such inherited land subject to the restriction that such conveyances must be approved by the Secretary of Interior. A literal construction of the Act, therefore, if any meaning whatever is to be given to the words "*all conveyances made under this provision*", etc., requires that it should be held that the approval of the Secretary of Interior is required only in cases where Section 22 has permitted alienation of lands which could not therefore be alienated. The opening sentence of the section is, "That the adult heirs of any deceased

Indian of any of the five civilized tribes, etc., *may sell and convey,*" etc. This was evidently intended to confer a power upon certain classes of Indians not theretofore existing. It is then provided that all conveyances made "*under this provision*" are subject to the approval of the Secretary of Interior. To construe the section otherwise than we have suggested would be to place Congress in the attitude of conferring a right upon Rachel James which she already had, and in that event, the words, "whose selection has been made" etc., found in the first part of the section, and also the phrase, "under this provision," as found in the last part of the section, may be eliminated entirely without destroying the meaning of the section. This would necessitate a departure from the usual canon of construction that effect must be given to every word in the statute if possible. Neither would it be a literal construction of the section. A similar course of reasoning was applied by Mr. Justice Pitney under somewhat analogous conditions in the case of *Woodward vs. DeGraffenried* 238 U. S. 284 at p. 317.

If the reasons which evidently moved Congress to the enactment of this section are considered, the Defendant in Error is not in a better situation. An examination of the debates in the Senate at the time of the passage of this Act discloses that it was passed, at least so far as the Senate was concerned, under considerable pressure. The Act was first brought up by the chairman of the committee for consideration in the Senate on February 26, 1906, and its immediate consideration was urged because of the fact, that by virtue of prior Act of Congress, the tribal government and relations of the five civilized tribes would expire only a few days later, to-wit, March 4, 1906. It was pointed out that this would be a serious matter for the reason that all community properties held by these tribes had been

patented to them vested title in them so long as they should exist as a nation or tribe. A later Act of Congress had provided a subsidy for certain railroads which might build through the Indian Territory by enacting that in the event of the reverter of these Indian lands to the government and it becoming public land, the title should then inure to the railways. Congress was, therefore, confronted with the situation that there was great danger of all of the community property of these tribes escheating to the railway within a few days unless some action was taken by Congress to prevent the expiration of the tribal government and relations. An examination of the debates in the Senate will indicate that many senators objected vigorously to being forced to such hasty action in a matter of such great importance. In fact, their objections were so serious that a joint resolution was passed before March 4th providing simply for the continuance of the tribal relations for a stated time, pending a further consideration of the details of the Act under consideration, and in that way some further time was secured for consideration, but the Act was passed and became a law in April following, the bill being in the conference committee the greater portion of that time.

It is, of course, not suggested that these considerations must control the construction of the Act, but they certainly indicate that the assumption of the Defendant in Error that this Act was one of great deliberation and for the purpose of correcting supposed mistakes arising from earlier *hasty* legislation is not supported by facts. This conclusion is also perhaps strengthened by the fact that a further Act of a general character was passed only two years later, to-wit, the Act of May 27, 1908. It is urged in the brief of the Defendant in Error that this Act should be liberally construed with the idea in view that the chief purpose of Congress

by the Act in question was to surround the Indian with all possible restrictions against disposing of his land. This court, however, has already pointed out that such has not been the purpose of Congress in its later Acts, but its purpose rather has been to fit the Indian to take his place and enjoy all the rights and privileges of citizenship and in that connection to gradually relieve him of restrictions upon conveyances of his land. In the case of the *United States vs. Celestine*, 215 U. S. 290, it is said:

"Of late years a new policy has found expression in the legislation of Congress—a policy which looks to the breaking up of tribal relations, the establishing of the separate Indians in individual homes, free from national guardianship and charged with all the rights and obligations of citizens of the United States. Of the power of the Government to carry out this policy there can be no doubt. It is under no constitutional obligation to perpetually continue the relationship of guardian and ward. It may at any time abandon its guardianship and leave the ward to assume and be subject to all the privileges and burdens of one *sui juris*. And it is for Congress to determine when and how that relationship of guardianship shall be abandoned. It is not within the power of the courts to overrule the judgment of Congress."

When it is considered that Indians in the situation of the Defendant in Error in this case have their homestead and surplus allotments in addition to lands which may be inherited by them, the wisdom of such a course on the part of Congress is evident and such a situation is an additional and strong reason why Section 22 should not be construed to include such inherited land, unless such construction is acquired by the literal meaning of the words used in the Act.

What has been said above as to the intention of Congress is further supported by the legislative interpretation

of the intent of Congress as expressed by its later Act of May 27th, 1908, paragraph 2, section 1 of which provides:

"The Secretary of Interior shall not be prohibited by this Act from continuing to remove restrictions as heretofore, and nothing herein shall be construed to impose restrictions removed from land or under any law prior to the passage of this Act."

Section 9 of that Act provides broadly:

"That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: Provided, That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee."

Section 9 above quoted is much broader in its terms than Section 22, Act of April 26, 1906 as to the lands to be covered by the restrictions, and yet this court applies to its construction the interpretation evidently intended by Congress as expressed in paragraph 2 of section 1, as above quoted.

Counsel for Defendant in Error in an appendix to his brief and also on page 41 of his brief relies upon an opinion rendered by Judge Campbell, District Judge of the Eastern District of Oklahoma in one of the so-called Thirty Thousand Land Suits. This ruling, however, has been departed from by Judge Campbell himself in the following cases:

Younkin vs. David, 235 Fed. 621
Harris vs. Bell, 235 Fed. 626
Sunday vs. Mallory, without opinion

The doctrine of that case has also been repudiated by the Circuit Court of Appeals of the 8th Circuit in Sunday vs. Mallory, 237 Fed. 526, and Bartlett vs. United States, 205 Fed.

410, and the decisions of this court upon kindred subjects cannot be harmonized with that doctrine, particularly such cases as *United States vs. Hemmer*, 241 U. S. 379; *Choate vs. Trapp*, 224 U. S. 665; *Mullen vs. United States*, 224 U. S. 448; *Skelton vs. Dill*, 235 U. S. 206; *Adkins vs. Arnold*, 235 U. S. 417; *Greenless vs. Morris*, 239 U. S. 627.

It can hardly be insisted, therefore, that the opinion of Judge Campbell, which has been repudiated by himself and by the other cases above mentioned, is any authority in support of the position of the Defendant in Error. The cases considered from the Supreme Court of the State of Oklahoma can no more be relied upon as authorities than the above repudiated opinion of Judge Campbell for the reason that those cases are simply a reiteration of the doctrine announced in the present case which is before this court upon appeal. Certain observations by Senator McCumber are quoted on pp. 45 to 50, of the brief of defendant in error. These remarks, however, it is clear, referred to the provisions of section 19, in the preparation of which the senator took a prominent part. They do not have to do with section 22.

Extensive quotations are also made from the brief of the government in the *Bartlett* case, on pp. 73 to 75 of the brief. The observations of Counsel for the government apparently did not commend themselves to the court in that case, and no reason appears why they should have consideration at this time.

SECOND.

That by virtue alone of the relation between the Government of the United States and the Indian Tribes in the nature of that of Guardian and Ward Congress has power not only to extend restrictions already existing but to reach out and place restrictions upon lands theretofore unrestricted.

Counsel for Defendant in Error seem to take the position that the mere relation existing between the United States and the Indian Tribes, ordinarily referred to as the relation of guardian and ward, is sufficient to empower Congress to legislate in whatever way it may see fit with reference to the conveyances of Indian lands and in that connection he makes a somewhat surprising attack upon the decisions of the Circuit Court of Appeals for the 8th Circuit in the case of Bartlett vs. United States, 205 Fed. 410, asserting that that case was grounded upon a fundamental misapprehension of the basis of the decision of this court in Tiger vs. Western Invesement Company, supra, in that it is insisted that the Circuit Court of Appeals construed the decision in the Tiger case to be based upon the proposition that Congress retains power to legislate and vary restrictions upon land only so long as the Government holds the title in trust for the benefit of the Indians. An examination of the opinion indicates, however that what the Circuit Court of Appeals had in mind in discussing the question was that so long as the period of restriction had not expired, Congress might further extend such period of restriction. It is true the court expressed this restricted period as being a period in which the land is held in trust for the United States, but those words are evidently used with the idea that *trust period* and *restricted* period are synomous terms. Certainly nothing further than that was indicated by this court in the Tiger case and it is hardly to be supposed that so able a court as the Circuit Court of Appeals for the 8th Circuit should have had so gross a misconception of the basis of the Tiger case as indicated by Counsel for Defendant in Error. There is even less reason to suggest that the decision in the case of Sunday vs. Mallory was based on any such a misapprehension, for an examination of the opinion in that case makes it very plain that the two cases depended upon for the conclu-

sion reached in that case are *Mullen vs. United States*, 224 U. S. 448 and *Skelton vs. Dill*, 235 U. S. 206. This is indicated by the language of the court at page 532 of the opinion, where it said, "In our opinion the *Mullen* case is controlling here." The Circuit Court of Appeals construed its own opinion in the *Bartlett* case in accordance with the construction we have above suggested, as evidenced by its language on page 535:

"In the case of *Bartlett vs. United States*, 203 Fed. 410, 121 C. C. A. 520, this court held that it was not within the power of Congress to impose restrictions upon the alienation of lands allotted to an Indian after the restrictions imposed by prior laws expired, and that acts general in their terms should not be construed as intended to apply to such cases."

Then after a discussion of the facts and quotations from the opinion in the *Bartlett* case, the court called attention to the fact that the *Bartlett* case was affirmed by this court, which founded its opinion upon the provisions of the Act of May 27, 1908, providing that nothing in that Act should be construed as placing restrictions upon land against which restrictions had theretofore expired or been removed. The Circuit Court of Appeals, however, continued on page 536 and 537:

"While the case was affirmed, therefore, the Supreme Court did not pass upon the question of the power of Congress to reimpose restrictions upon the alienation where they had been removed. We see no reason, however for changing the opinion of this court in the *Bartlett* case, as applied to the facts therein disclosed."

That court very aptly suggests the basis upon which the right of Congress to control Indian lands is founded in the following words:

"The plan of legislation did not contemplate restricting alienations of all lands that a full-blood Indian might in any wise acquire; for example by purchase, or in any other manner than from the Government. In other words, it was not merely the relationship of guardian and ward between the government and the Indian that was the foundation and reason for restrictions upon alienation of his land, but it was this relationship plus the plan of distributing allotments of lands in severalty to living members of the several tribes, and the restrictions were limited to the reasonable carrying out of the plan. It was in view of such considerations that restrictions were imposed upon alienation of allotments to living members, first, while in the hands of the allottee; and, secondly, to a less extent while in the hands of the heirs."

The above quotations from the case of *Sunday vs. Mallory* seem to be conclusive not only that the court was not laboring under a misapprehension of the doctrine laid down in the *Tiger* case, but that in the opinion of that court the doctrine of the *Tiger* case necessarily leads to the conclusion suggested in the *Bartlett Case* and the *Sunday vs. Mallory* case. It will be noted, also, that in the above mentioned opinion the decision of the Supreme Court of the State of Oklahoma in the instant case was expressly referred to and repudiated by the court.

No purpose could be served by again reviewing the cases which were cited in our original brief upon this subject, except that it seems to us that the doctrine contended for by the Defendant in Error is directly discountenanced by this court in the very late case of *United States vs. Waller*, 243 U. S. 452, where the court had under consideration the right of the United States by virtue alone of its guardianship relation to the Indians to maintain suit in behalf of an Indian to set aside conveyances alleged to have been

fraudulently obtained. The decision of the case seems to turn upon the fact that the United States had relinquished all control over the land in question and it was held that the United States did not have a right to represent the Indian in such litigation merely by virtue of its guardianship relations. On page 463 of that opinion it is said:

"In the case now before us, in whatever other respect the Government of the United States may continue to hold these Indians as wards, needing and receiving protection from its authority over their persons and property, as to the lands in question, the United States, in the passage of the Clapp Amendment, evidenced its purpose to grant full power and control to the class named. As to them the Government has no further interest in or control over the lands."

The question of whether a patent has or has not been given to the individual Indian for the allotment is of no consequence in this case. The legal title had passed by patent from the United States to the Indian Tribe as long ago as 1842 pursuant to an Act of Congress passed in 1831; and both the allotment certificate and allotment patent had been issued and delivered in 1904 to the mother of defendant in error during her life time.

This court has properly gone to a great extent in upholding the power of Congress to deal with lands of the Indians, in many cases suggesting the necessity of the case as a reason for upholding the power asserted by Congress, these decisions do not rest solely upon the ground of necessity. They are grounded upon other principles which are to the end that the Indians may be properly protected, but defensible as legal propositions. In many cases a permissible construction of the acts of Congress will serve the desired end. In other cases, as in the Tiger case, the power of Congress is upheld upon the ground that it had not released

its hold upon the land, and therefore that it might continue to fix the terms upon which alienation might be made. If the court goes beyond cases of this character and holds that Congress, after having entirely released its control over lands of the Indian or of any other citizen, may reach out and again place them under restriction there would seem to be no possible ground to justify such a conclusion unless it might be said to be the mere necessity of the case, and we believe that would be too uncertain a guide to be accepted by this court, as a legal principle.

Moreover, no necessity exists in cases of this character to make such a strained construction of the power of Congress. It is not a question, as supposed by counsel for Defendant in Error, of upholding a gigantic scheme of fraud and chicanery to deprive the Indians of their property, but for the most part it would simply serve to save to investors property which they have acquired in good faith and for a fair consideration in reliance upon the obvious legal interpretation of the Act in question. The instant case is not an unfair illustration of the condition which probably exists as to a great proportion of lands based upon this character of title. As heretofore suggested, lands of this class do not constitute the homestead of the Indian; he has additional lands from his own allotments sufficient for all purposes, and he should not be permitted to make conveyance of his land under these circumstances and then sue for its recovery to the detriment of those who have dealt with him in good faith.

SIDE LIGHTS FROM THE DISCUSSION IN CONGRESS.

As indicative of the circumstances leading up to the passage of the Act in question, the reasons advanced for some of its provisions and the opinions of some of the Senators who had made a special study of the question, as to the extent of the power of Congress in such cases, we have collected, and herewith set forth certain remarks made during the discussion of the bill in the senate.

That the legal title had passed from the government and the Indians were the owners of the land is indicated by the remarks of Senator Teller, as follows:

"It (referring to the Indian Tribes) is the sovereignty that holds these titles and when that sovereignty ceases and expires no man here who is a lawyer need be told that the title must vest somewhere—it cannot float, it cannot be in the air." 40 Congressional Record 2975-6.

Senator Aldrich objected to the hasty consideration of such important legislation in the following language:

"We are passing legislation here about the sale of lands and about the disposition of vast sums of property with no knowledge, so far as I know, on the part of a large majority of the Senate, as to what the effect of the legislation will be, and it seems to me that we ought, in justice to ourselves, as well as in justice to the Indians, to take this question up, continue the tribal relation, and proceed with deliberation and with care upon legislation for these great interests."
40 Congressional Record 3053.

Mr. Aldrich then proposed a concurrent resolution tending simply to continue the tribal relation for a short period in order, as he said:

"to get time to consider it carefully."

Senator Stone, remarking upon the policy of the Government in permitting the Indians to gradually dispose of their land other than homestead, said:

"To say that they shall not have the right to dispose of their property because forsooth it happens that there are some citizens among them who are incompetent does not strike me, Mr. President, as representing a policy that we ought to enter upon in this Congress. It seems wrong in itself. It is a violation of the solemn compact that we made with these Indian tribes and we ought not to violate that agreement with impunity."

40 Congressional Record 3275.

In the brief of the Defendant in Error, at page 49, is a partial quotation of some remarks by Senator McCumber, but the complete force of the remarks are not indicated because of the omission of the following language which should be added to the quotation in said brief on page 50:

"I know it has been often stated here that the best thing for the Indian is to place him upon his land and let him shift for himself. I will agree to that proposition *provided you have given him a good home and that you will not allow him to sell that home*, but you cannot place him in a position where he can sell his property that he will not sell it and that in a very short time."

40 Congressional Record 3275.

The amendment to Section 19 as originally offered by Senator McCumber, read as follows:

"Sec. 19. That all restrictions upon alienation and leasing of land of Indian allottees of the Choctaw, Chickasaw, Cherokee, Creek and Seminole tribes are, except as to the homestead hereby removed. That no fullblood of any of said tribes or his fullblood heirs shall have power to alienate, sell, dispose of or encumber in any manner any of the land allotted to him for a period of 25 years from and after the passage and approval of

this act unless such restrictions shall prior to the expiration of said period be removed by Congress. Provided however, that such fullblood Indians of any of said Tribes may lease any lands other than homesteads under such rules and regulations as may be prescribed by the Secretary of the Interior, and in case of the inability of any such fullblood owner of a homestead on account of infirmity or age to work or farm his homestead, the Secretary of the Interior upon proof of such inability, may authorize the leasing of such homestead under such rules and regulations." 40 Congressional Record 3273.

As indicating the thought of the Committee in placing certain restrictions upon the land by the proposed Act, Senator Teller made the following statement:

"These people are citizens of the United States and I say it is impossible to put any restriction upon their title that is not already on. There is where I differ with the Senator. This provision for leasing the land and putting the matter under the Secretary probably would not stand the test of the law for a minute, yet the Committee thought it best to those people that did lease their land to put them under a *moral restraint*, if it could not put them under a legal restraint and to provide that it should supervise that leasing. On no other theory can you put it in there at all. An Indian holds a title subject to certain conditions. He owns the land as absolutely except as to these conditions as any other man." 40 Congressional Record 4650-1.

In discussing the provision to restrict leases, Senator Spooner remarks upon the futility of removing restrictions where none existed in the following language:

"If there are no restrictions upon the power to alienate there is no sense whatever in this provision removing the restriction upon the power of alienation." Congressional Record 4651.

As to the extent of the power of Congress to enlarge restrictions, Senator Clapp remarked:

"That is the exact condition we have been drawn into. After you have made a treaty with an Indian giving him the right to citizenship and then allotting him lands simply with a restriction then he owns that property as absolutely as the Senator owns his own home, subject only to the restriction of alienation, and that it is beyond the power of Congress after that to enlarge that restriction, or, in other words, reduce the right of alienation."

40 Congressional Record 5052.

Senator McCumber sums up his position as follows:

"My position has been, and is yet, that although the government has declared that it will remove a restriction within a certain time, *if that time has not lapsed* and the ward has not disposed of the property, as long as the wardship continues the government may still extend the provision for another term of years."

"Mr. Spooner, I am entirely in accord with the Senator."

Mr. McCumber. "It is the view I took here, although I am free to say that many senators did not agree with my legal proposition." 40 Congressional Record 4653.

It is therefore still contended that the decision of the Supreme Court of Oklahoma should be reversed.

Respectfully submitted,

D. M. TIBBETTS.

FRED W. GREEN, .

Of Counsel for Plaintiff in Error.

3
Office Supreme Court, U. S.
FILED

DEC 13 1917

JAMES D. MAHER;
CLERK.

No. 126.

In the
Supreme Court of the United States.
October Term, 1917.

J. H. BRADER, - - - - - *Plaintiff in Error,*

VERSUS

RACHEL JAMES, - - - - - *Defendant in Error.*

IN ERROR TO THE SUPREME COURT
OF THE STATE OF OKLAHOMA.

BRIEF FOR APPELLEE.

A. M. WORKS,
Hugo, Okla.,
JOSEPH C. STONE,
Muskogee, Okla.,
Attorneys for Defendant in Error.



In the
SUPREME COURT OF THE UNITED STATES.
October Term, 1917.

No. 126.

J. H. BRADER, - - - - - Plaintiff in Error,
vs.
RACHEL JAMES, - - - - - Defendant in Error.

IN ERROR TO THE SUPREME COURT
OF THE STATE OF OKLAHOMA.

INDEX.

	Page
STATEMENT.	1

PROPOSITION I.

Congress intended, by the Act of April 26, 1906, to place all full-blood Indian heirs as to all allotted lands in the Indian Territory, whether theretofore restricted or unrestricted, under the supervisory care of the Secretary of the Interior so far as to make conveyances of their said lands invalid unless approved by the Secretary. 13

- 1 The two principal propositions involved, first, whether Congress intended to place all full-blood Indian heirs as to all of their inherited allotted lands, including the lands theretofore unrestricted, under the supervisory care of the Secretary of the Interior in all matters of conveyance and, second, if Congress so intended, whether it had the constitutional power to accomplish its purpose, are hardly separable, for an examination of the matters bearing upon the construction of the statute necessarily covers much of the ground to be examined when considering the constitutional point presented, (but so far as able to do so counsel present the two points separately, discussing first the question of construction) 13

INDEX—CONTINUED.

	Page
2 The Act of April 26, 1906, provides a comprehensive scheme which affects all the fullblood citizens of the Five Civilized Tribes and their fullblood heirs and all of their allotted lands in the Indian Territory, and the same is a substitute for, and repeals all prior legislation relating to restrictions upon fullbloods. By said Act the competency or incompetency of enrolled citizens and their heirs and the procedure for the alienation of their lands, are to be determined from their degree of blood as shown by the enrollment records of the Five Tribes. Prior acts for which this was a substitute did not constitute special legislation within the rule of construction invoked by plaintiff in error.....	14
3 Section 22 of the Act of April 26, 1906, was enacted by Congress in the exercise of the guardianship of the government over the person of the Indians, their property which they received from the public domain of the tribes, and over the tribal relations, and it rests with Congress alone to determine when these wards of the government shall be entirely <i>sui juris</i> in the matter of their conveyances of allotted lands.....	28
4 The literal and natural meaning of section 22 of the Act of April 26, 1906, brings the allotted lands theretofore unrestricted within the terms of the act requiring all conveyances by full-blood Indian heirs of their inherited allotments to be approved by the Secretary of the Interior	31
5 To construe section 22 of the Act of April 26, 1906, so as to require all conveyances by Indian heirs of the full-blood conveying their allotted lands to be made under the supervisory control of the Secretary of the Interior is in full accord with the general spirit and policy of the entire act and other legislation in <i>pari materia</i> . The necessity for supervision was the same whether the lands were theretofore alienable without approval or alienable only with the approval of the Secretary. The act should be construed liberally in the interest of the Indians to meet the necessities of the Indians, and to correct, as Congress intended, the mistakes of prior legislation. Sections 19 and 23 aid in the construction of Section 22	44

INDEX—CONTINUED.

	Page
6 Departmental practice does not, as contended by plaintiff in error, support his contention. On the other hand, the executive practice, for whatever it is worth, and the early court decisions, both state and federal, support the contentions of the defendant in error.....	53
7 The cases of <i>Bartlett v. United States</i> , <i>Sunday v. Malory</i> , and other cases relied upon by the plaintiff in error upon the question of construction examined.....	54

PROPOSITION II.

The provision at section 22 of the Act of Congress of April 26, 1906, "all conveyances . . . by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior under such rules and regulations as he may prescribe" construed as applicable to all allotted lands in the hands of full-blood Indian heirs, whether theretofore restricted or unrestricted, is well within the constitutional power of Congress..... 59

1 Section 22 of the Act of April 26, 1906, provides merely a procedure for the alienation of their inherited lands by full-blood Indian heirs and does not prohibit the alienation thereof, nor does it impair any property rights or contractual relations. The method of procedure provided is reasonable, and is analogous to many state laws which permit the sale of the family homestead only with the approval of the spouse of the grantor. The grantee of the Indian cannot avail himself of the right, if any, of the Indian to assert the unconstitutionality of the act which provides this procedure..... 59

2 The authority of Congress to enact sections 22 and 19 and similar provisions in the Act of April 26, 1906, is grounded in necessity because the power exists nowhere else. The dependence of the Indians on the one hand and the duty of the government on the other have resulted in a well established governmental policy commensurate with the needs of the Indians, and Congress alone must determine when this policy, called a guardianship, is determined..... 69

INDEX—CONTINUED.

	Page
3 This case is not distinguishable from <i>Tiger v. Western Investment Company</i> , 221 U. S. 286, 55 L. ed. 738, for the power exercised by Congress in the enactment of section 22 is precisely the same power which resulted in the enactment of section 19 construed and held to be valid in the <i>Tiger case</i>	72
4 The question whether Congress has the power after the admission of the Indian Territory into the new State of Oklahoma to impose restrictions so as to withdraw the lands from taxation and the burdens of state government does not arise.....	80
5 The cases of <i>Bartlett</i> against the United States and <i>Sunday v. Mallory</i> , and other cases relied upon by the appellant, considered further and with reference to the constitutional point presented. The legal title to the land involved in <i>Sunday v. Mallory</i> , had not passed from the tribe and from the government prior to April 26, 1906, which fact in itself shows that the decision of the Circuit Court of Appeals was erroneous.....	80
6 The arguments by the Supreme Court of Oklahoma, both upon the question of construction and the constitutional point involved, are unanswerable and constitute in themselves a brief worthy of the careful consideration of the Supreme Court. Though the questions here involved have been determined ten times by the state Supreme Court, the reasons supporting the conclusions of the state court are found principally in <i>Brader v. James</i> , 154 Pac. 560; <i>Moffett v. Conley</i> , 163 Pac. 118; <i>Cushing v. Whaley</i> , 165 Pac. 135, to which particular attention is called....	87

INDEX—CONTINUED.

AUTHORITIES CITED.

	Page
Bowling v. U. S., 233 U. S. 528, 58 L. ed. 1080.....	29
Brader v. James, (Okla.) 154 Pac. 560.....	28, 41, 87, 88
Bruner v. Nordmeyer, 166 Pac. 126.....	87
Chupco v. Chapman, 4 Okla. App. Ct. Rep. 339, Decided Oct. 2, 1917, not yet officially reported.....	59, 67, 68, 87
Cushing v. Whaley, (Okla.) 165 Pac. 135.....	28, 87
Ex parte Webb, 225 U. S. 663, 56 L. ed. 1284.....	28, 70
Haliowell v. U. S., 221 U. S. 317, 55 L. ed. 750.....	29
Heckman v. United States, 224 U. S. 442, 56 L. ed. 820.....	29, 78
Lula v. Powell, (Okla.) 166 Pac. 1050.....	87
McCosar v. Chapman, 157 Pac. 1059.....	87
Moffett v. Conley, (Okla.) 163 Pac. 118.....	28, 60, 87
Mullen v. United States, 224 U. S. 448, 56 L. ed. 834.....	27
Perrin v. United States, 232 U. S. 478, 58 L. ed. 691.....	70
Richard v. Parker, 245 Fed. 330.....	59, 67
Sampson v. Smith, 166 Pac. 422.....	87
Sampson v. Staples, 155 Pac. 213.....	87
Smith v. Stephens, 10 Wall. 321.....	59
Tiger v. Western Investment Co., 221 U. S. 286, 55 L. ed. 738.....	15, 26, 28, 35, 39, 59, 69, 72
United States v. Bartlett, No. 251, October Term, 1914.....	24, 73
United States v. Bartlett, 235 U. S. 72, 59 L. ed. 137.....	35
United States v. Celestine, 215 U. S. 278, 54 L. ed. 195.....	51, 69, 70
U. S. v. Nice, 241 U. S. 519, 60 L. ed. 1192.....	28
Williams v. Johnston, 239 U. S. 414, 60 L. ed. 358.....	28, 59, 65, 66, 69
United States v. Kagama, 118 U. S. 375, 30 L. ed. 228.....	29, 69, 70
Willson v. Morton, 29 Okla. 745, 119 Pac. 213.....	60, 66
United States v. Pelican, 232 U. S. 442, 58 L. ed. 676.....	29, 70
United States v. Sandoval, 231 U. S. 28, 58 L. ed. 107.....	29, 69

ACTS AND LAWS QUOTED.

	Page
Act of April 26, 1906 (34 Stat. L. 137).....	15, 16, 17, 32
Act of April 21, 1904 (33 Stat. L. 189).....	25
Act of May 27, 1908 (35 Stat. L. 312).....	35, 60
Congressional Record, Vol. 40.....	45
Oklahoma Enabling Act, 34 Stat. L. 267.....	69, 75

In the
SUPREME COURT OF THE UNITED STATES.
October Term, 1917.

No. 126.

J. H. BRADER, - - - - - Plaintiff in Error,

vs.

RACHEL JAMES, - - - - - Defendant in Error.

IN ERROR TO THE SUPREME COURT
OF THE STATE OF OKLAHOMA.

**BRIEF UPON BEHALF OF
DEFENDANT IN ERROR.**

Statement.

This is an appeal from the Supreme Court of Oklahoma. Two questions are presented: (1) Did Congress intend, by the Act of April 26, 1906, to place all full-blood Indian heirs under the supervisory care of the Secretary of the Interior in the matter of their

conveyances of inherited allotments, whether theretofore restricted or unrestricted. (2) Is the provision at section 22 of the Act of Congress of April 26, 1906, that "all conveyances by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior," when construed as applicable to all allotted lands in the hands of full-blood Indian heirs, whether theretofore restricted or unrestricted, within the constitutional power of Congress. For a statement of the facts and the law points involved we adopt the statement by the Supreme Court of Oklahoma, which is as follows:

"On October 27, 1905, Cerena Wallace, a full-blood Choctaw Indian, died, leaving as her sole surviving heir at law her daughter, Rachel James, *nee* Reeves, the defendant in error. Thereafter, and on the 17th day of August, 1907, said defendant in error, a full-blood Choctaw, joined by her husband, Davis James, attempted to convey by warranty deed a part of the lands inherited by her from her deceased mother, the lands sold constituting the homestead allotment of 160 acres and 40 acres of the surplus allotment. On the 13th day of September, 1909, the purchaser, Tillie Brader, for the consideration of \$1, executed to the plaintiff in error, J. H. Brader, a quitclaim deed to said land. The deed executed by Rachel James and her husband to Tillie Brader, was never approved by the Secretary of the Interior, neither does it appear that it was ever presented for approval. On August

28, 1912, Rachel James instituted in the District Court of Choctaw County an action at law to recover the possession of said land, and for the use and occupation thereof during the time the same was occupied by defendant, Brader. Trial being had, judgment was awarded plaintiff for the possession of the land and for \$250, which sum the court found to be the reasonable rental value of the property, after crediting the defendant with the value of all improvements which he had erected thereon.

“The record before us fairly presents these questions: (1) Could Rachel James, a full-blood Choctaw Indian, on and after the 26th day of April, 1906, and before May 27, 1908, convey the lands inherited by her from her mother, who was a full-blood Choctaw Indian, and which lands had been allotted to her during her lifetime, so as to give a good title to the purchaser, without the conveyance being approved by the Secretary of the Interior; (2) if the legislation of Congress undertook to make such conveyances valid only when approved by the Secretary of the Interior, is it constitutional?

“The allotment made to Cerena Wallace was under authority of, and, originally in the matter of alienation, controlled by, sections 12, 15 and 16 of the Supplemental Agreement with the Choctaws and Chickasaws of July 1, 1902 (32 Stat. at L. 641, c. 1362). According to section 12 of said agreement, it was provided that each member of said tribes should, at the time of the selection of his allotment, designate as a home-
stead out of said allotment lands equal in value

to 160 acres of the average allottable land of the Choctaw and Chickasaw Nations, as nearly as might be, which should be inalienable during the lifetime of the allottee, not exceeding 21 years from the date of certificate of allotment, and that separate certificate and patent should issue for said homestead. As to the surplus allotment, it was provided by section 16 that all the lands allotted to the members of said tribes, except such land as was set aside to each for a homestead, as therein provided, should be alienable after the issuance of patent as follows: One-fourth in acreage in three years, and the balance in 5 years; in each case from date of patent; *provided*, that such land should not be alienable by the allottee or his heirs, at any time before the expiration of the Choctaw and Chickasaw tribal governments, for less than its appraised value. In section 15 it was provided that lands allotted to members should not be affected or incumbered by any deed, debt or obligation of any character, contracted prior to the time at which said land might be alienated under said act, nor should said land be sold except as therein provided. It will be observed that the homestead lands were inalienable——

‘during the lifetime of the allottee, not exceeding 21 years from the date of certificate of allotment.’

“The period of restriction was thus definitely limited, and the clear implication is that when the prescribed period expired, the lands were to become alienable; that is, by the heirs of the allottee upon his death, or by the allottee

himself at the end of 21 years. Thus, with respect to homestead lands, the Supplemental Agreement imposed no restriction upon alienation by the heirs of a deceased allottee. This was the view taken in *Mullen et al. v. United States*, 224 U. S. 448, 32 Sup. Ct. 494, 56 L. ed. 834, where it was said that, where lands were allotted to a living member of the tribe, upon his death the homestead portion thereof descended free of restrictions. When the 40 acres of surplus allotment became alienable it is impossible to determine from the record; neither, as we shall presently see, is it important to a determination of the case. Some 16 months prior to the conveyance by Rachel James, Congress passed the Act of April 26, 1906 (34 Stat. at L. p. 137, c. 1876). From this act it appears that Congress had undertaken to make new provisions for the protection of full-blood Indians of the Five Civilized Tribes, and to place them, as to the alienation, disposition, and incumbrance of their lands, under restrictions such as to operate to protect them, and to require the Secretary of the Interior to approve conveyances of certain classes of Indians, in order that they might part with lands of the character named therein only upon fair remuneration, and when their interests had been sufficiently safeguarded by competent authority. This intention is clearly expressed in various sections of the act, particularly in sections 19, 21, 22 and 23. While all are important, and bear upon the question of the policy of Congress with regard to full-blood Indians, section 22 is the only one with which we are directly concerned.

This section provides:

‘That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States Court for the Indian Territory. And in the case of the organization of a state or territory, then by a proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe’.”

The propositions and principal points of this brief are as follows :

PROPOSITION 1.

Congress intended, by the Act of April 26, 1906, to place all full-blood Indian heirs as to all allotted lands in the Indian Territory, whether theretofore restricted or unrestricted, under the supervisory care of the Secretary of the Interior so far as to make conveyances of their said lands invalid unless approved by the Secretary.

1. The two principal propositions involved, *first*, whether congress intended to place all full-blood Indian heirs as to all of their inherited allotted lands, including the lands theretofore unrestricted, under the supervisory care of the Secretary of the Interior in all matters of conveyance and, *second*, if Congress so intended, whether it had the constitutional power to accomplish its purpose, are hardly separable, for an examination of the matters bearing upon the construction of the statute necessarily covers much of the ground to be examined when considering the constitutional point presented. But so far as able to do so counsel present the two points separately discussing first the question of construction.

2. The Act of April 26, 1906, provides a comprehensive scheme which affects all the full-blood citizens of the Five Civilized Tribes and their full-blood heirs and all of their allotted lands in the Indian Territory, and the same is a substitute for, and repeals all prior legislation relating to restrictions upon full-bloods. By said act the competency or incompetency of enrolled citizens and their heirs and the procedure for the alienation of their lands, are to be determined from their degree of blood as shown by the enrollment records of the Five Tribes. Prior acts for which this was a substitute did not constitute special legislation within the rule of construction invoked by plaintiff in error.
3. Section 22 of the Act of April 26, 1906, was enacted by Congress in the exercise of the guardianship of the Government over the person of the Indians, their property which they received from the public domain of the tribes, and over the tribal relations, and it rests with Congress alone to determine when these wards of the Government shall be entirely *sui juris* in the matter of their conveyances of allotted lands.
4. The literal and natural meaning of Section 22 of the Act of April 26, 1906, brings the allotted lands theretofore unrestricted within the terms

of the act requiring all conveyances by full-blood Indian heirs of their inherited allotments to be approved by the Secretary of the Interior.

5. To construe section 22 of the Act of April 26, 1906, so as to require all conveyances by Indian heirs of the full-blood conveying their allotted lands to be made under the supervisory control of the Secretary of the Interior is in full accord with the general spirit and policy of the entire act and other legislation *in pari materia*. The necessity for supervision was the same whether the lands were theretofore alienable without approval or alienable only with the approval of the Secretary. The act should be construed liberally in the interest of the Indians to meet the necessities of the Indians, and to correct, as Congress intended, the mistake of prior legislation. Sections 19 and 23 aid in the construction of section 22.
6. Departmental practice does not, as contended by plaintiff in error, support his contention. On the other hand, the executive practice, for whatever it is worth, and the early court decisions, both state and federal, support the contentions of the defendant in error.
7. The cases of *Bartlett v. United States*, *Sunday v. Mallory*, and other cases relied upon by the

plaintiff in error upon the question of construction examined.

PROPOSITION II.

The provision at section 22 of the Act of Congress of April 26, 1906, "all conveyances * * * by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior under such rules and regulations as he may prescribe" construed as applicable to all allotted lands in the hands of full-blood Indian heirs, whether theretofore restricted or unrestricted, is well within the constitutional power of Congress.

1. Section 22 of the Act of April 26, 1906, provides merely a procedure for the alienation of their inherited lands by full-blood Indian heirs and does not prohibit the alienation thereof, nor does it impair any property rights or contractual relations. The method of procedure provided is reasonable, and is analogous to many state laws which permit the sale of the family homestead only with the approval of the spouse of the grantor. The grantee of the Indian cannot avail himself of the right, if any, of the Indian to assert the unconstitutionality of the act which provides this procedure.

2. The authority of Congress to enact sections 23 and 19 and similar provisions in the Act of April 26, 1906, is grounded in necessity because the power exists nowhere else. The dependence of the Indians on the one hand and the duty of the government on the other have resulted in a well established governmental policy commensurate with the needs of the Indians, and Congress alone must determine when this policy, called a guardianship, is determined.
3. This case is not distinguishable from *Tiger v. Western Investment Company*, 221 U. S. 286, 55 L. ed. 738, for the power exercised by Congress in the enactment of section 22 is precisely the same power which resulted in the enactment of section 19 construed and held to be valid in the *Tiger case*.
4. The question whether Congress has the power after the admission of the Indian Territory into the new State of Oklahoma to impose restrictions so as to withdraw the lands from taxation and the burdens of state government does not arise.
5. The cases of *Bartlett against the United States* and *Sunday v. Mallory*, and other cases relied upon by the appellant considered further and

with reference to the constitutional point presented. The legal title to the land involved in *Sunday v. Mallory*, had not passed from the tribe and from the Government prior to April 26, 1906, which fact in itself shows that the decision of the Circuit Court of Appeals was erroneous.

6. The arguments by the Supreme Court of Oklahoma, both upon the question of construction and the constitutional point involved, are unanswerable and constitute in themselves a brief worthy of the careful consideration of the Supreme Court. Though the questions here involved have been determined ten times by the State Supreme Court, the reasons supporting the conclusions of the state court are found principally in *Brader v. James*, 154 Pac. 560; *Moffett v. Conley*, 163 Pac. 118, *Cushing v. Whaley*, 165 Pac. 135, to which particular attention is called.

BRIEF and ARGUMENT.

Proposition 1.

Congress intended, by the Act of April 26, 1906, to place all full-blood Indian heirs as to all their allotted lands in the Indian Territory, whether theretofore restricted or unrestricted, under the supervisory care of the Secretary of the Interior so far as to make conveyances of their said lands invalid unless approved by the Secretary.

(1) The two propositions here involved, *first*, whether Congress intended to place all full-blood Indian heirs as to all their inherited lands in the Indian Territory, including the lands theretofore unrestricted, under the supervisory care of the Secretary of the Interior in all matters of conveyance, and *second*, if Congress so intended, whether it had the constitutional power to carry out this purpose, are hardly separable, as we shall soon see, for an examination of the matters bearing upon the construction of the statute necessarily covers much of the ground to be examined when considering the constitutional point presented. But so far as able to do so, counsel present the two points separately, first discussing the question of construction. In the proper study of

both these questions there must be considered the tribal governments of the Five Civilized Tribes, which still exist, the guardianship of the government over the *persons* and property and tribal relations of the Indians of the Five Civilized Tribes, the improvidence and dependence of the Indians on the one hand and the obligation of the government on the other to protect these wards of the government, the general policy, spirit and scope of the act of April 26, 1906, and legislation *in pari materia*, the necessity for supervisory control over the Indians in matters of their conveyances of allotted lands, which resulted in the comprehensive act of April 26, 1906, which was intended to correct the mistakes of prior legislation, and which was further intended to avoid the confusion which had arisen because of prior ill-advised, haphazard and unscientific legislation for the respective tribes and the nature and scope of said act which does not impair, as the defendant in error contends, any property rights but merely imposes a method of procedure to safeguard the full-blood Indians against their own improvidence.

(2) The act of April 26, 1906, provides a comprehensive scheme which affects all the full-blood citizens of the Five Civilized Tribes and their full-blood heirs and all of their allotted lands of the Indian Territory, and the same is a substitute for and

repeals all prior legislation affecting restrictions upon the lands of full-blood Indians.

--*Tiger v. Western Investment Co.* 221 U. S. 286, 55 L. ed. 738.

By this act the competency or incompetency of enrolled citizens and their heirs and the procedure for the alienation of their lands are to be determined from their degree of blood as shown by the enrollment records of the Five Civilized Tribes. Sections 19, 20, 22 and 23 contain the more important provisions of this comprehensive plan for dealing with the full-bloods of the Five Civilized Tribes in all matters of restriction, and provide as follows:

“*Sec. 19.* That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this act, unless such restriction shall, prior to the expiration of said period, be removed by act of Congress; and for all purposes the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior: *Provided*, however, That such full-blood Indians of any of said tribes may lease any lands other than homesteads for more than one year under such rules and regulations as may be prescribed by the Secretary of the Interior; and in case of the inability of any

full-blood owner of a homestead, on account of infirmity or age, to work or farm his homestead, the Secretary of the Interior, upon proof of such inability, may authorize the leasing of such homestead under such rules and regulations: *Provided*, further, that conveyances heretofore made by members of any of the Five Civilized Tribes subsequent to the selection of allotment and subsequent to removal of restrictions, where patents thereafter issue, shall not be deemed or held invalid solely because said conveyances were made prior to issuance and recording or delivery of patent or deed; but this shall not be held or construed as affecting the validity or invalidity of any such conveyance, except as hereinabove provided; and every deed executed before, or for the making of which a contract or agreement was entered into before the removal of restrictions be, and the same is hereby, declared void: *Provided further*, That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee.’’

“*Sec. 20.* That after the approval of this act all leases and rental contracts, except leases and rental contracts for not exceeding one year for agricultural purposes for lands other than homesteads, of full-blood allottees of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole Tribes shall be in writing and subject to approval by the Secretary of the Interior and shall be absolutely void and of no effect without such approval: *Provided*, That allotments of

minors and incompetents may be rented or leased under order of the proper court: *Provided further*, That all leases entered into for a period of more than one year shall be recorded in conformity to the law applicable to recording instruments now in force in said Indian Territory."

"*Sec. 22.* That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States court for the Indian Territory. And in case of the organization of a state or territory, then by a proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe."

"*Sec. 23.* Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein: *Provided*, That no will of a full-blood Indian devising real estate shall be valid, if such last will and testament

disinherits the parent, wife, spouse, or children of such full-blood Indian, unless acknowledged before and approved by a judge of the United States Court for the Indian Territory, or a United States Commissioner."

Section 19 is applicable only to the allotments of living full-blood Indians, and applies only to the lands which they received as their distributive share of the lands of the respective tribes. Prior to the enactment of section 19 the allotments of full-blood Indians of the several Five Civilized Tribes were governed by very different provisions as regards alienation. When allotment in the several tribes was made Congress was governed very largely by the desires of the Indians of the different tribes as their wishes were made known through their principal chiefs, head men, or legislative bodies. The result was a state of confusion. In the Choctaw and Chickasaw nations or tribes much of the surplus lands of the full-bloods was already alienable prior to the Act of April 26, 1906. Each allottee in those tribes was authorized by section 16 of the Act of July 1, 1902 (32 Stat. 641), to convey freely and without approval one-fourth in acreage of his surplus allotment in one year and one-fourth in acreage in three years and the balance in five years, in each case from date of patent. Many patents had been dated and issued and some had been delivered. Report Commissioner Five Civilized

Tribes to Secretary for year ended June 30, 1906, page 62. The full-blood Indian was inclined to select for his first conveyance one-fourth in acreage of his most valuable land. Under the provisions of said section 16 it was impossible to determine what part of his surplus allotment was alienable until the full-blood Indian exercised his privilege of selecting the one-fourth in acreage for sale. A serious question arose as to what the date of the patent was in each case, for each patent went through a long process prior to delivery, passing from the Commission to the Five Civilized Tribes to the Secretary of the Interior then to the Governor of the Tribe, and receiving several dates. As a matter of history it may be stated that the Governors of the Tribes delivered many patents without the authority of the Secretary of the Interior, and these patents were subsequently recalled. Many of them in the hands of full-bloods were lost before they received the final approval of the Secretary of the Interior. An intolerable situation developed in which no prudent person attempted to pass a title without a thorough examination of the records and proceedings before the Dawes Commission at Muskogee and the proceedings before the Secretary at Washington. No one knew for certain the date of a patent or what constituted a delivery or when it was delivered or when the one-fourth in acreage of a full-blood Choctaw or Chickasaw Indian

was alienable. As further illustrating the illogical prior Acts of Congress it should be noted that prior to the Act of April 26, 1906, if an allottee selected all of his allotment, both homestead and surplus, before his death, after his death the homestead was alienable but the surplus was not. If all of the allotment was selected after the death of the citizen it was alienable in its entirety. *If prior to the death of the original allottee he had selected part of his surplus allotment only, the balance was selected after his death with the result that the part of his surplus allotment which was selected before his death was inalienable and that selected after his death was alienable.* Many serious questions arose as to when an allotment was selected, some contending that the selection was made and that the equitable title passed as of the date when the allottee made his application for the land, others contending that the selection was not complete and that the equitable title did not pass until the actual date of the issuance of the allotment certificate. The confusion and uncertainty in the Choctaw and Chickasaw Nations which manifested the inefficiency of prior legislation was not more marked than in the other tribes.

A brief review of the provisions affecting the several tribes which antedated the Act of April 26, 1906, may be helpful. The court has but recently considered this legislation in *Tiger v. Western In-*

vestment Co., 221 U. S. 286, which involved an inherited Creek allotment; *Heckman v. United States*, 224 U. S. 413, which involved a Cherokee allotment; *Mullen v. United States*, 224 U. S. 448, and *Choate v. Trapp*, 224 U. S. 665, involving Choctaw and Chickasaw allotments; *Goat v. United States*, 224 U. S. 458, and *Deming Investment Co. v. United States*, 224 U. S. 437, involving Seminole allotments. The legislative agreement with the several tribes affecting alienation are discussed in these cases.

Creek allotments prior to the Act of April 26, 1906, as regards alienation by Indians, were governed principally by section 16 of the Supplemental Creek Agreement of June 30, 1902. It was provided that Creek citizens (Indians of the full blood, Indians of mixed blood, freedmen and adopted citizens) might alienate all their surplus allotments after five years from the date of the approval of the agreement and their homesteads 21 years from the dates of the deeds thereafter, or after the death of the allottee. There was no distinction between the allottees based on blood or actual competency.

The Act of July 1, 1898, which ratified the agreement with the Seminoles (30 Stat. 567, 568), provided for the allotment of all the tribal lands among the members of the tribe. Conveyances or encumbrances of allotments were forbidden prior to the date of

patent, and homesteads were made inalienable in perpetuity. It was further provided that patents should be delivered by the principal chief upon the extinction of the tribal government. The Act of March 3, 1903 (32 Stat. 1008), provided that the tribal government should not continue longer than March 4, 1906, and that the deeds should be made and delivered by that date and that homesteads should be inalienable "during the lifetime of the allottee not exceeding 21 years from the date of the deed." The tribal governments of the Five Civilized Tribes, Cherokee, Creek, Seminole, Choctaw and Chickasaw, were continued by joint resolution of March 2, 1906 (34 Stat. 822), and by the Act of April 26, 1906 (34 Stat. 137, 148, Sec. 28). There was, therefore, in the Seminole Nation, one restriction for the homestead and another for the surplus, that of the homestead being inalienable during the life of the allottee or for twenty-one years from the date of the deed, and the surplus was alienable from and after the date of the deed. But no distinctions were made on account of the degree of blood, the competency or incompetency of any member of the tribe. Full-blood Indians, mixed-blood Indians and freedmen were all treated alike.

The special provisions for the Cherokees are found in the Act of July 1, 1902 (32 Stat. 716), which was accepted by the Cherokee Nation on August 7,

1902. Section 13 of said act provides that homesteads "shall be inalienable during the lifetime of the allottee, not exceeding 21 years from the date of the certificate of allotment." By the provisions of section 14 lands allotted to citizens were not to be alienated by the allottee or his heirs before the expiration of five years from the ratification of the act. Section 15 provided that all lands except homesteads should be alienable in five years after issuance of patent. It was provided that allotment certificates were to be issued by the Dawes Commission at the time of allotment and that patents were to thereafter issue. No distinction was made between the full-bloods, mixed-bloods, or freedmen.

The special provisions affecting the Choctaws and Chickasaws who occupied the same territory and were governed by the same acts were reviewed by this court in *Mullen v. United States*, 224 U. S. 452. The Act of July 1, 1902 (32 Stat. 641), known as the Supplemental Agreement, is the legislation for the Choctaws and Chickasaws under which the allotment here involved was received. By section 11 of the act each member (except Freedmen) was to receive the equivalent of 320 and each Freedman the equivalent of 40 acres of the average allottable land of the tribes. By section 12 it is provided that each citizen should have a homestead equal to 160 acres, the same to be inalienable during his lifetime not exceeding 21 years

from the date of the certificate of allotment, and that separate certificates and patents should issue for the homestead and the surplus allotments. The allotment of freedmen was also declared inalienable during the lifetime of the allottees not exceeding 21 years from the date of the certificate of allotment. By section 16 the lands allotted to citizens, other than Freedmen, except homesteads, were to be alienable one-fourth in one year, one-fourth in three years, and the balance in five years from date of patent, with the proviso that such lands should not be alienable at any time before the expiration of the tribal governments for less than the appraised value. As compared with some of the other tribes, for illustration the Creek, the Choctaws and Chickasaws had an express provision for the issuance of an allotment certificate, whereas there was no provision at all in any Act of Congress for the issuance of an allotment certificate to a Creek citizen. In the early legislation for the Choctaws and Chickasaws there was no distinction based on blood or competency. Indians of all degrees of blood and intermarried whites were treated alike.

This situation in the five tribes was well stated by the brief upon behalf of the government in the case of *United States v. Bartlett*, No. 251, October term, 1914, at page 16, thus:

“These tribal agreements were neither con-

sistent with each other nor (it must be added with all deference, in the light of subsequent experience) with common sense and justice. From the standpoints of the incompetent Indian and of the government as his only protector, they were wise and just only in so far as they locked up his homestead during 21 years, if he should live so long, and to the more limited extent to which they safeguarded his surplus. From the standpoints of the competent Indian and the future State of Oklahoma, in anticipation of whose creation the agreements were encouraged, they were unwise in so far as they prevented him from selling at will. The situation called for reformation at the hands of Congress. * * *

The first effort by Congress to establish a reasonable and workable basis for the determination of the competency of a citizen of the Five Civilized Tribes is found in the Act of April 21, 1904 (33 Stat. L. 189), which provides, in part:

“And all the restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians who are not of Indian blood, except minors, are, except as to homesteads, hereby removed, and all restrictions upon the alienation of all other allottees of said tribes, except minors, and except as to homesteads, may, with the approval of the Secretary of the Interior, be removed under such rules and regulations as the Secretary of the Interior may prescribe, upon application to the United States Indian agent at the Union Agency in charge of

the Five Civilized Tribes, if said agent is satisfied upon a full investigation of each individual case that such removal of restrictions is for the best interest of said allottee."

Under the foregoing provisions of the act of April 21, 1904, citizens of the tribes by intermarriage, by adoption, and freedmen could alienate their surplus allotments, but still no distinction was made between full-blood Indians and mixed-blood Indians. Experience demonstrated that the full-bloods were less inclined to associate with their white neighbors and to learn from them the wisdom necessary to protect them in their conveyances. *Therefore Congress adopted the policy of dealing generally with the full-blood Indians as a class, distinguishing them from intermarried citizens, from whites and freedmen and adopted citizens.* The degree of blood as shown by the enrollment records was made the basis of all legislation affecting restrictions, because experience showed that was a reasonable and workable basis for the determination of competency.

Tiger v. Western Investment Co., 221 U. S. 286, 55 L. ed. 738, squarely holds that the Act of April 26, 1906, was a *comprehensive system* for the protection of all full-blood Indians. There it was said:

"We think a consideration of this act and of subsequent legislation *in pari materia* therewith demonstrates the purpose of Congress to

require such conveyances by full-blood Indians to be approved by the Secretary of the Interior.

* * * The sections of the Act of April 26, 1906, under consideration, show a comprehensive system of protection as to such Indians."

As a part of this comprehensive plan found in the Act of April 26, 1906, section 22 places all full-blood Indian heirs in the Five Civilized Tribes in a single class as regards all of their inherited lands, whether theretofore restricted or unrestricted, regardless of all prior legislation with respect to this class. There are no saving words anywhere in the act to except inherited lands theretofore alienable from the operation of the act.

In the case of *Mullen v. United States*, 224 U. S. 448, 450, 56 L. ed. 834, in considering conveyances by Choctaw and Chickasaw full-blood heirs made prior to the act of April 26, 1906, this court expressly called attention to the fact that the lands there involved were conveyed prior to the act of April 26, 1906, saying:

"The lands conveyed to the appellants are described as those which had been allotted to Choctaws of the fullblood, deceased, and the conveyances were made by the heirs (also Choctaws of the fullblood) prior to April 26, 1906."

The plaintiff in error erroneously contends that acts prior to April 26, 1906, relating to full-blood In-

dians and their lands were special acts and that therefore they were not repealed by the general provisions of the act of April 26, 1906, but the various acts relating to the several tribes were *general* and not special laws and clearly were not within the rule of construction invoked by the plaintiff in error. Special statutes relate to private interests, and deal with the affairs of persons, places, classes, etc., which are not of a public and general character.

(3) Section 22 of the act of April 26, 1906, was enacted by Congress in the exercise of its plenary power arising in the guardianship of the Government over the *persons* of the Indians, over their property which they received from the public domain of the tribes, and over their tribal relations, and it rests with Congress alone to determine when these wards of the government shall be entirely *sui juris* in the matter of their conveyances of allotted lands.

—*Tiger v. Western Investment Co.*, 221 U. S. 286, 55 L. ed. 738;

U. S. v. Nice, 241 U. S. 519, 60 L. ed. 1192;

Williams v. Johnston, 239 U. S. 414, 60 L. ed. 358;

Re Webb, 225 U. S. 663, 56 L. ed. 1248;

Brader v. James (Okla.) 154 Pac. 560;

Moffett v. Conley, (Okla.) 163 Pac. 118;

Cushing v. Whaley, (Okla.) 165 Pac. 135;

Hallowell v. U. S. 221 U. S. 317, 55 L. ed. 750;

Bowling v. U. S. 233 U. S. 528, 58 L. ed. 1080;

United States v. Pelican 232 U. S. 442, 58 L. ed. 676;

Heckman v. United States 224 U. S. 442, 56 L. ed. 820;

United States v. Kagoma 118 U. S. 375, 30 L. ed. 228;

United States v. Sandoval, 231 U. S. 28, 58 L. ed. 107.

The briefs of learned counsel for the plaintiff in error seem to overlook these important matters: The government has never surrendered its guardianship over the *persons of the full-blood Indians of the Five Civilized Tribes nor has it terminated its guardianship over tribal affairs. All these full-blood Indians remain the wards of the government.* For them the United States maintains, at Muskogee, Oklahoma, a great Indian office, with many employes. The several tribes have their tribal attorneys. The Government provides for the Indians probate attorneys to appear for them in the various courts of Oklahoma, particularly in the probate courts. Field clerks are provided throughout the east half of the State of Oklahoma, formerly Indian Territory. These field clerks travel throughout the Five Civilized Tribes and aid and assist the Indians,

particularly the fullbloods, in transacting their business. The government supervises the education of the Indians in the east half of Oklahoma and continues to appropriate money for that purpose. The tribal funds have not been as yet entirely distributed to the individual members of the tribe. Congress enacts and enforces laws against the introduction and sale of intoxicating liquors in the country formerly the Indian Territory. These are matters which tend to show the intention of Congress in the enactment of the *comprehensive scheme* for the protection of full-blood Indians found in the act of April 26, 1906, As was said by the Supreme court in the *Tiger* case, approval of a conveyance by a full-blood Indian is required by Congress to protect the Indian *against his own improvidence*. In considering what Congress meant, at section 22 we find, in brief, this situation: *All the fullblood heirs were in theory equally dependent and helpless and improvident. Their inherited lands were carved out of the public domain of the tribe. The guardianship of the Government extended not only over the tribal relations of which the full-blood Indians were members, but over the very persons of the Indians themselves. And out of this personal dependence of the Indian on the one hand and the duty of the Government on the other to protect him from his own improvidence, and out of the tribal relations of these Indians over which*

the Government had such a guardianship as Congress deemed necessary for the protection of the Indians, this legislation arose. We here suggest a point which we shall argue more fully later. *Congress has never based its right to impose restrictions upon the alienation of Indian lands upon the fact that the land was theretofore restricted, but rather in the well known and general policy of the government toward the dependent Indians, which policy, for want of a better name, is called a guardianship and is grounded in the doctrine of necessity. In the Tiger case the court said, referring to this guardianship and the power of Congress to impose restrictions in virtue thereof: "While it still continues, it has the right to vary its restrictions upon the alienation of the Indian lands in their promotion of what it deems the best interest of the Indian."*

(4) The literal and natural meaning of section 22 of the act of April 26, 1906, brings the land theretofore unrestricted within the terms of the act requiring all conveyances by full-blood Indian heirs of their inherited allotments to be approved by the Secretary of the Interior.

Having found that the act of April 26, 1906, provides a comprehensive scheme for all the full-blood Indians of the Five Civilized Tribes as respects their lands which they had taken directly by allotment or

by inheritance and that the same is a substitute for and repeals all prior legislation affecting said full-blood Indians and relating to their said lands, and having found from the opinions of this court that these full-blood Indians are still the wards of the Government, we are at a suitable place to consider the natural meaning of section 22 of the act of April 26, 1906. The literal meaning of the act brings the land here involved within the terms of section 22. For convenience of the court we here quote the section in its entirety to call attention to its precise words:

“That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States court for the Indian Territory. And in case of the organization of a state or territory, then by a proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe.”

In order to arrive at the natural meaning of section 22, we suggest that there should be kept in mind *first*, the repeal of "all acts and parts of acts inconsistent with the provisions of this act" which was provided for at section 29, and, *second*, that Congress was enacting *a comprehensive scheme applicable to all full-blood Indians*. With these two points in mind, let us examine the very words of section 22. The statute is directed toward "the adult heirs of *any* deceased Indian of either of the Five Civilized Tribes whose selection has been made or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she *belongs or belonged*." The words "*adult heirs of any deceased Indian*" include all the full-blood Indian heirs in the Five Civilized Tribes. The word "*any*" excludes none. The words "to which he or she *belongs or belonged*" include all full-blood Indians, whether their ancestors died before or after the act. Whilst prior to the act of April 26, 1906, the homestead here involved was alienable by the heir without approval of the Secretary, the enactment of a comprehensive scheme applicable to all full-blood Indians with the provision "that all acts and parts of acts inconsistent with the provision in this act be, and the same are hereby, repealed" made this particular homestead tract of land inalienable except with the approval of the Secretary of the Interior, for by sec-

tion 22 all full blood Indian heirs were brought into a great group and classified with respect to their blood, their want of competency determined by the fact that they were full-blood Indians. The situation was precisely the same as if Congress had enacted a law in these words: This act of April 26, 1906, shall be construed as a comprehensive scheme for the protection of full-blood Indian heirs in the Five Civilized Tribes and as a substitute for all prior acts of Congress relating to them, and prior legislation in conflict with this act is hereby repealed, and it is further expressly enacted that the adult heirs of any deceased Indian of either of the Five Civilized Tribes may convey his inherited lands only by the method herein provided, and all such conveyances by full-blood Indian heirs are to be subject to the supervisory control of the Secretary of the Interior and void if not approved by him. Counsel for the plaintiff in error lean heavily upon the words "all conveyances made *under this provision*," and seem to make the point that the homestead here involved, being alienable before the act of April 26, 1906, could be conveyed thereafter without being "made under this provision." But this construction is entirely too narrow and overlooks the general spirit and policy of the act, as we shall show in the following paragraph, and overlooks these controlling elements if the statute is to be taken literally and naturally, namely:

that all prior legislation in conflict with the act was repealed and this act was made a substitute for prior legislation affecting full-blood Indians. In considering the natural meaning of section 22, section 9 of the act of May 27, 1908, which was enacted as a substitute for the act of April 26, 1906, is helpful. It provides, in part, as follows:

“The death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee’s land: *Provided*, That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee.”

In the case of *United States v. Bartlett*, 235 U. S. 72, 59 L. ed. 137, this court said, with respect to the literal meaning of said section 9:

“If taken literally, the language which we have quoted from the act of 1908 is doubtless broad enough to embrace all allotments of the class described whether then subject to the original restriction or theretofore freed from it. But that language is not to be taken literally for it is followed by a declaration that ‘nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this act’.”

In the case of *Tiger v. Western Investment Co.*, 221 U. S. 286, 55 L. ed. 738, it appears that this court

construed section 22 literally as applicable to *all full blood Indian heirs*, using, in part, the following language:

“Coming now to section 22, the first part of that section gives the adult heirs of any deceased Indian of either of the Five Civilized Tribes power to sell and convey the inherited lands named, with certain provisions as to joining minor heirs by guardians in such sales. This part of the statute would enable full-blood Indians, as well as others, to convey such lands as adult heirs of any deceased Indian, etc., but the last sentence of the section requires the conveyance made under this provision, that is, conveyances made by adult heirs of the character named in the first part of the section when full-blood Indians, to be subject to the approval of the Secretary of the Interior. This construction is in harmony with the other provisions of the act and give due effect to all the parts of section 22. True, it has the effect to extend the requirement of the approval of the Secretary of the Interior as to full-blood Indians beyond the terms prescribed in section 16 of the act of 1902, and this, we think, was the purpose of Congress, which is emphasized in section 29 of the act, wherein all previous inconsistent acts and parts of acts are repealed.

“As to the argument that the last sentence of section 22 is construed as a proviso intended to limit the generality of the previous part of the section, and not to affect prior legislation upon the subject, it may be observed: the sentence

does not take the ordinary character of a proviso and is not introduced as such, and, even if regarded as a proviso, it is well-known that independent legislation is frequently enacted by Congress under the guise of a proviso. *Interstate Commerce v. Baird*, 194 U. S. 25, 36, 48, L. ed. 860, 865, 24 Sup. Ct. Rep. 563, and previous cases in this court therein cited.

“Had Congress intended not to interfere with full-blood Indian heirs in their right to make conveyances after the expiration of the five years named in section 16 of the act of 1902, it would have been easy to have said so, and some reference would probably have been made to the prior legislation. No reference is made to the prior legislation, but it is broadly enacted that all conveyances of the character named in section 22, made by heirs of full-blood Indians, shall be subject to the approval of the Secretary of the Interior.

“The construction contended for by the defendants in error places Congress in the attitude of requiring such conveyances to be made with the approval of the Secretary of the Interior for the time between the passage of the act of 1906 and the expiration of the period named in the act of 1902, with unrestricted power thereafter to make such conveyances without such approval. Such construction is inconsistent with subsequent legislation of Congress upon the same subject, and which proceeds upon the theory that, in the understanding of Congress, at least, restrictions still existed so far as the

inherited lands of full-blood Indians were concerned.

“Section 8 of the act of May 27, 1908 (35 Stat. at L. 312, chap. 199), provides:

‘*Sec. 8.* That section 23 of the act entitled “An act to Provide for the Final Disposition of the Affairs of the Five Civilized Tribes in the Indian Territory, and for Other Purposes,” approved April 26th, 1906, is hereby amended by adding, at the end of said section the words, “or a judge of a county court of the State of Oklahoma.”’

“Section 9 of that act provides:

‘*Sec. 9.* That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee’s land: *Provided*, That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee, etc., etc.’

“The obvious purpose of these provisions is to continue supervision over the right of full-blood Indians to dispose of lands by will, and to require conveyances of interest of full-blood Indians in inherited lands to be approved by a competent court.

“When several acts of Congress are passed, touching the same subject-matter, subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same

subject. *Cope v. Cope*, 137 U. S. 682, 34 L. ed. 832, 11 Sup. Ct. Rep. 222; *United States v. Freeman*, 3 How. 556, 11 L. ed. 548.

“We cannot believe that it was the intention of Congress, in view of the legislation which we have quoted, to leave untouched the five-year restriction of the Act of 1902, so far as the inherited lands of full-blood Indians are concerned, or to permit the same to be conveyed without restriction from the expiration of that five-year period until the enactment of the legislation of May, 1908.

“In passing the Enabling Act for the admission of the State of Oklahoma, where these lands are, Congress was careful to preserve the authority of the government of the United States over the Indians, their lands and property, which it had prior to the passage of the act. 34 Stat. at L. 267, chap. 3335.

“We agree with the construction contended for by the plaintiff in error, and insisted upon by the government, which has been allowed to be heard in this case, that the Act of April, 1906, while it permitted inherited lands to be conveyed by full-blood Indians, nevertheless intended to prevent improvident sales by this class of Indians, and made such conveyances valid only when approved by the Secretary of the Interior.”

As was said in the *Tiger* case, *supra*:

“Had Congress intended not to interfere with full-blood Indian heirs in their right to

make conveyances after the expiration of the five years named in section 16 of the Act of 1902, it would have been easy to have said so, and some reference would probably have been made to the prior legislation. No reference is made to the prior legislation, but it is broadly enacted that all conveyances of the character named in section 22, made by heirs of full-blood Indians, shall be subject to the approval of the Secretary of the Interior",

so it is here. Had Congress intended not to interfere with full-blood Indian heirs of the class here involved in their right to make conveyances, *it would have been easy to have said so, and some saving reference would have been made to the prior legislation.* No reference is made to prior legislation except to repeal it, and it is broadly enacted that all conveyances by full-blood Indian heirs should be subject to approval by the Secretary of the Interior.

It appears that in the case of *Bartlett v. United States*, 203 Fed. 410, decided March 3, 1913, the first court decision was handed down announcing that Congress had not reimposed restrictions upon lands of full-blood Indian heirs which were once alienable without approval. But, as we shall show later, this announcement was pure dictum. *Prior to that time it had been considered that such lands were inalienable except with the approval of the Secretary of the Interior*, as will appear presently.

On the 30th day of October, 1912, the United States District Court for the Eastern District of Oklahoma, filed an opinion in one of the so-called Thirty Thousand Land Suits, which we print as an appendix hereto, styled "A", because the opinion was not published. In that case the court said, upon the question of the intention of Congress:

"Section 22 imposes a condition in the nature of a restriction upon the alienation by full-blood heirs of lands inherited by them from any deceased Indian of the Five Civilized Tribes, and here also it appears to have been the intention of Congress to reimpose this restriction upon the alienation where by operation of law restrictions theretofore imposed had expired, and to impose it even upon inherited lands, though they might have been previously alienable in the hands of the ancestor or the full-blood heirs."

As to the literal and natural meaning of section 22 the Supreme Court of Oklahoma said, in this case:

"The proviso to section 22, if taken literally, can lead to but one conclusion, and that is: All deeds to inherited allotted lands, made by full-blood Indian heirs, after the passage of the act, are subject to the approval of the Secretary of the Interior. Said section conferred upon heirs the right to sell and convey inherited lands, but of full-blood Indian heirs it was required that all conveyances made by them should be subject to the approval of the Secretary of the Interior, under such rules and regulations

as that officer might prescribe. In other words, the right of alienation was given upon the condition, in the case of full-blood Indian heirs, that the Secretary of the Interior should be satisfied with and approve the conveyance made; the obvious object of the provision being one of protection to the Indian.

“Nor is there anything in the language used or in the history of the times, to indicate a purpose to confine the operation of the statute to sales and conveyances made by full-blood heirs to lands thereafter inherited, and to exclude lands thereafter inherited, but not conveyed, prior to its adoption. The one class needed protection as much as the other, and each are equally within the statute, fairly construed.

“In *Mullen v. United States*, 224 U. S. 448, 32 Sup. Ct. 494, 56 L. ed. 834, the lands conveyed to the appellants were described as those which had been allotted to Choctaws of the full blood, deceased; and the conveyances were made by the full-blood heirs prior to April 26, 1906, and prior to which time there was, as we have seen, no restrictions upon the right of alienation of such heirs. In other words, the heirs in that case had authority of law to make the deeds attacked, notwithstanding the fact that they were full bloods; this, under section 22 of the Supplemental Agreement. That attention is called to the fact that the conveyances were made prior to April 26, 1906, is, to our minds, significant, for if the act of that date is without force as to unrestricted inherited lands of full bloods, it would not matter when the conveyance was made,

if the contention of the plaintiff in error be correct. Our conclusion, then, is that the proviso or latter clause of section 22 of the Act of April 26, 1906, means just what it says, and requires that all deeds made by full-blood Indian heirs of inherited allotted lands, since the passage of the act, in order to be valid, must be approved by the Secretary of the Interior. This, too, regardless of the fact that Cerena Wallace, the full-blood allottee, died before the passage of the Act of April 26, 1906, for it is the law in force at the date of conveyance, and not that of the time of the death of the ancestor, that controls. *Mallarry v. Eatman*, 29 Okla. 46, 116 Pac. 935; *Harris v. Gale*, (C. C.) 188 Fed. 712; *United States v. Knight et al.*, 206 Fed. 145, 124 C. C. A. 211; *Stephens v. Smith*, 10 Wall. 321, 19 L. ed. 933."

Aside from the general scope, spirit and policy of the Act of April 26, 1906, which we shall consider directly, taken at its literal and natural meaning, section 22 must be construed to include inherited lands in the hands of full-blood Indian heirs though such lands may have been alienable without the approval of the Secretary of the Interior before April 26, 1906, and the intention of Congress is the more apparent when it is considered that this provision does not prohibit the sale of such lands which were theretofore alienable, but provides only a procedure as a means of protection for these full-blood heirs against their own improvidence. To exclude this

land in the hands of a full-blood heir from the operation of section 22 would be to ignore the spirit and general scope of the act, and to strike down the *scheme* which Congress enacted for the protection of these full-blood Indians. No *system* would be left. It is just as far from the letter of the statute to state that section 22 does not require the approval of the Secretary of all conveyances by full-blood Indian heirs as it would be to assert that section 19 does not operate to reimpose restrictions or safeguards upon the surplus allotments of living full bloods. *It has never been contended, so far as we know, that Congress did not intend to reimpose restrictions upon the surplus lands of living full-bloods as to their individual allotments. Certainly this was done in many a case in the Choctaw and Chickasaw Nations, where their patents were dated more than a year prior to April 26, 1906.*

(5) To construe section 22 of the Act of April 26, 1906, so as to require all conveyances by Indian heirs of the full blood of their inherited lands to be made under the supervisory control of the Secretary of the Interior, is in full accord with the *general spirit and policy* of the entire act and other legislation *in pari materia*. The necessity for supervision was the same whether the lands were theretofore alienable without approval or alienable only with the approval

of the Secretary. The act should be construed *liberally in the interest of the Indians to meet the necessities of the Indians and to correct, as Congress intended, the mistakes of prior legislation.* Sections 19 and 23 aid in the construction of section 22.

In the *Tiger* case it was said, "We agree with the construction contended for by the plaintiff in error and insisted upon by the government, which has been allowed to be heard in this case, that the Act of April 26, 1906, while it permitted inherited lands to be conveyed by full-blood Indians *nevertheless intended to prevent improvident sales by this class of Indians*, and made such conveyances valid only when approved by the Secretary of the Interior." (Italics ours.)

The spirit and purpose of this new and comprehensive scheme for the protection of full-blood Indians appears manifest in the debate which occurred in Congress at the time of the enactment of the law. We copy the following from the speech of Senator McCumber, Vol. 40, Congressional Record:

"Mr. President, the Senator cannot see but that there is some scheme in this; that somebody is getting something out of it. I am responsible on this floor for that amendment (referring to section 19). It has not been suggested to me by any person upon the face of the earth, only as I have become acquainted with the Indians, and as

I have become more and more impressed, especially since I have been in Congress, by an almost systematic effort to rob the full-blood and every other Indian of all the property that he may have.

“The Senator states that the Indian is doomed. Perhaps he is. I admit that finally he is; but I insist that it is the duty of Congress to protect him and shield him just as long as it can. I go a step further and say, if we have made any treaty or any agreement which we have since found to be inimical to the interests of the Indians, it is our moral duty to reject that agreement; it is our moral duty to pass a law that will protect him against the rapacity of the white settler. Whether that settler will get that land away from the Indian even though we put a restriction of twenty-five years against alienation, I am not prepared to say. However, I do not believe that, if you do continue that restriction, the Indian is going to be thrown a pauper upon the government so long as that restriction continues. I do believe, however—aye, I know it—that the moment you remove those restrictions you have got a pauper to deal with, and to deal with him as you will. Any man who knows anything about the Indian’s character—any man who knows the history of the Indians, for the last fifty or seventy-five years—will not deny the fact that that is going to be the result.

.

“If that is true, it seems to me there is ground for holding that we ought to protect them; and I say again to the Senator, you can

talk all you are a mind to about civilizing the Indian the same as you would a white-man—by making him get down and work himself up, but he never will do it. You can take a white man, and he may be a pauper, and that may be for his best interest, because it places him upon his own responsibility. But you must remember that he has an inheritance of thousands of years which has given him the energy, the determination, the industrial character to build himself up. The exact opposite has been the history of the red-man; and because he has those characteristics we may never hope to make him the equal of the white man. If we will admit that, and proceed to make the very best Indian we can out of him, and observe our moral duty, remembering that we have stolen the continent from him—if we do our duty and continue his poor life as long as we can, we will always provide a home for him; give him a home upon terms under which he cannot sell it, so that he can come back to it whenever he finds that there is no other place on the face of the earth to lay his head.

“Mr. President, that is the spirit which backs the introduction of this amendment, and it is the only spirit that has controlled in seeking to make this amendment a law by passing it through both houses of Congress, in order to protect the Indians, in the future, at least, for as many years as possible.

* * * * *

“Mr. President, we have but these few remnants of the people left, and I confess that my

sentiment joins with my sense of justice in announcing that there is a duty upon the Government of the United States to protect those few remnants of full-blood Indians in the Indian Territory if it is possible to do so.

“The Indian is improvident. I never saw one yet—a full-blood Indian I am speaking of now—who had any property which could be sold that a white man could not obtain in six months for one-half of its value, if he stayed by him long enough, and tried to impress him with the necessity of selling it. Whenever we have given the Indian the right to sell his land, he has sold it. Not only that, but I am informed today by some of the best authority from the Indian Territory, that for a bottle of whiskey up to \$5.00 there are hundreds or thousands of claims that have been already sold subject to the possibility that Congress might ratify those previous sales.

* * * * *

“Now, Mr. President, we have passed the kind of laws I have stated. I think we have made treaties with the Seminoles that there shall be no restrictions on some of their lands. So have treaties been made with others, that the restriction shall expire within a certain time; with still others that it shall expire in a little longer time; with still others it shall remain for twenty-one years, I think. So there are several different laws fixing restrictions upon the sale of their lands which shall be allotted to them.

“In a great many instances they have attempted to sell the lands, whether homesteads or

otherwise, despite the restrictions, and for almost nothing. Can we not say with almost absolute certainty that if you give them the power of sale, within a few months all of the property will be transferred from the Indian to white settlers, and transferred for whatever the white settler sees fit to give him?

* * * * *

“There are about 24,000, I think, of the full bloods left. Of those 24,000 it is probably true that not 2 per cent of them would be capable of holding their own property and protecting it against the wiles of the white man, and it is for the benefit of those full-blood Indians that I have introduced the amendment. It does not affect any of the others.

* * * * *

“I base my statement, Mr. President, *first*, upon a pretty intimate acquaintance with full-blood Indians themselves. Almost ever since I can remember I have been acquainted with the Indians, with their characteristics, and have had a good deal of dealing with them, and have seen their dealings with the white people. Taking my own acquaintance and observation wherever I have seen them have any business relations with white men, and taking the testimony which was to the effect that the full-blood Indians down in the Indian Territory did not differ materially in their character for indigence from the full-blood Indians anywhere else, I think I can safely say that almost 90 per cent of them would not be able to withstand the onset of the

white civilization to get possession of their property. If that is true—and I think every one who knows anything about the Indian character will agree with me that it is true—we come right back to the question whether or not it is our duty and whether we are not in conscience obligated to protect those Indians by such means as are necessary to protect them. * * *

As to the purpose of this legislation and the liberal construction which should be given thereto, we cite the following apt words from the opinion of Justice SHARP of the Supreme Court of Oklahoma, in *Moffett v. Conley*, 163 Pac. 119:

* * * "The purpose of the provision of the statute requiring the approval of her conveyance was her protection, to secure to her the fair value of her land. *Tiger v. Western Inv. Co.*, 221 U. S. 286, 31 Sup. Ct. 578, 55 L. ed. 738; *Brader v. James*, 154 Pac. 560. The statute affording her this protection should be liberally construed, to the end that the beneficent purpose of Congress may not be defeated. *Woodward v. de Graffenried*, *supra*; *United States v. Nice*, 241 U. S. 591, 36 Sup. Ct. 696, 60 L. ed. 1192. Or, as said in *Lerindale Lead & Zinc Mining Co., et al v. Coleman*, 241 U. S. 432, 36 Sup. Ct. 644, 60 L. ed. 1080:

"The provisions of the allotment act must be construed in the light of the policy they were obviously intended to execute. It was the policy relating to the welfare of Indians, wards of the United States. The es-

tablishment of restrictions against alienation “evinces the continuance, to this extent, at least, of the guardianship which the United States had exercised from the beginning”.’ (Citing cases).

“Her knowledge of land values, of transactions in respect to the disposition thereof, and her dependency in general, was not made to rest, nor did it depend in any respect, upon the fact that the land was or was not allotted in the lifetime of her father.”

In the case of *United States v. Celestine*, 215 U. S. 278, 54, L. ed. 195, it was said, with reference to the liberal rule of construction to be applied in such matters, that acts for the protection of the Indians should be construed

“Bearing in mind the rule that the legislation of Congress is to be construed in the interest of the Indian.”

The *Celestine* case is very significant in this, that the court took occasion to remark that it was manifest from the act of May 8, 1906, extending the expiration of the trust period during which the Government should hold the Indian's property, that Congress “*believed that it had been hasty.*” The Act of April 26, 1906, should be construed as showing that Congress believed *it had acted too hastily* in permitting full-blood Indian heirs to sell certain of their lands without any supervisory care exercised over

them. That Congress considered much prior legislation a mistake and that it had acted too hastily, is manifested not only by section 22 but by section 19, in this: *Section 19 clearly imposes restrictions against the alienation by full-blood Indians of their individual allotments, parts of which were theretofore alienable.* Section 23 of the act of April 26, 1906, by its broad terms is applicable to wills made by all full-blood Indians covering their allotted lands, and certainly includes the lands theretofore inherited by full-blood Indians. It provides, in effect, that no full-blood Indian of either of the Five Civilized Tribes may will any of his allotted land except in the manner provided at section 23. Such a will had to have the approval of a United States Commissioner until the act of May 27, 1908, and after the later act had to be approved by a United States Commissioner or by a County Judge in Oklahoma. But section 23 does not inhibit the making of wills by full-blood Indians but prescribes merely the method by which they may make valid wills. A law prohibiting the making of wills is clearly distinguishable from a law which merely provides the exclusive procedure by which a will may be made; likewise a law which provides the procedure for the sale of inherited land is distinguishable from an act which prohibits the sale. Of this we shall have more to say when discussing the constitutional question.

(6) Departmental practice does not, as contended by plaintiff in error, support his contention. On the other hand, the executive practice, for whatever it may be worth, and the early court decisions, both state and federal, support the contentions of the defendant in error.

Learned counsel for the plaintiff in error appear to attach much importance to a certain letter of January, 1907, written by one of the assistants to the Attorney General, in which he held such a homestead alienable without the approval of the Secretary of the Interior, but this does not establish or prove a departmental practice. It is a well known historical fact that the Department of the Interior many times ignores such opinions and it appears that probably this opinion was ignored by the Secretary of the Interior; for in the well known opinion by the Honorable Samuel Adams, First Assistant to the Secretary of the Interior, under date of January 25, 1912, addressed to the Honorable Dana H. Kelsey, head of the Indian office at Muskogee, Oklahoma, in what is known as the *Benjamin Harrison* case, which involved an inherited Creek allotment in *Inherited Land Case* No. 858, it was held that the allotment was inalienable though made to the heirs.

The executive practice was the direct opposite of that for which the plaintiff in error contends. In evidences of this we cite the well-known

fact which has already been attracted to the attention of this court, that when the Government of the United States in the spring of 1908 commenced at Muskogee, Oklahoma, certain actions involving the validity of some 30,000 conveyances covering allotted land in the Indian Territory, the conveyances were classified, all the conveyances of a particular class being grouped together in a single bill, and by this classification the conveyances by full-blood Indians made before April 26, 1906, covering inherited lands were included in one group as distinguished from conveyances made by full-blood heirs after the act of April 26, 1906. We have already shown that long prior to the *Bartlett* case by the Circuit Court of Appeals for the Eighth Circuit the United States Court for the Eastern District of Oklahoma held that section 22 imposed a condition in the nature of restriction upon the alienation of full-blood Indian heirs of lands inherited by them from any deceased Indian of the Five Civilized Tribes, and that it was the intention of Congress to reimpose this restriction where by operation of law restrictions theretofore imposed had expired, and to impose it upon such inherited lands, although they might have been previously alienable.

(7) The case of *Bartlett v. United States*, 203 Fed. 410, decided by the Circuit Court of Appeals, Eighth Circuit, March 3, 1913, which involved a con-

veyance after May 27, 1908, contains, it appears, the first expression by any court sustaining the views of the plaintiff in error. In the *Bartlett* case the court said, in effect, *first*, that Congress did not intend by the act of May 27, 1908, to re-impose restrictions upon allotted lands theretofore alienable, and *second*, that if Congress had intended to do so it was within the constitutional power to accomplish its purpose. *Neither of these points was in any manner involved in the case*, and it would perhaps be difficult to find a more patent case of pure *dictum*. When the case reached this court (*United States v. Bartlett*, 235 U. S. 72, 59 L. ed. 137,) the decision turned upon the point that the act of May 27, 1908, contained the express provision that "nothing herein shall be construed to impose restrictions removed from any land by or under any law prior to passage of this act." The restrictions had been removed from the land involved in the *Bartlett* case by operation of law prior to the act of May 27, 1908, and it may be truly said, therefore, that the facts of that case did not present either a question of construction or of constitutional law but the simplest application of the plainest statute. The *Bartlett* case contains a fundamental misapprehension of the *Tiger* case, which mistake may be regarded as the source of the erroneous conclusion in the case later of *Sunday v. Malloy*, by the Circuit Court of Appeals for the Eighth

Circuit, namely: the Circuit Court of Appeals construed the *Tiger* case to mean that this court had held that Congress has the power to impose or extend restrictions upon Indian lands only so long as the trust period for which the Government holds the title for the benefit of the Indians, and that upon the expiration of such trust period and the acquisition of both the legal and equitable title that the Government is without authority to vary the restrictions upon the Indians or their lands. But in the *Tiger* case the full legal and equitable title had passed prior to April 26, 1906, and it was held that Congress had the right in the exercise of its guardianship over the full-blood Indians to vary the restrictions on lands to which the Indians had *both the equitable and legal title*.

Sunday v. Mallory, 237 Fed. 526, decided September 4, 1916, appears to be the only reported case purporting to sustain the view of the plaintiff in error. We respectfully submit that it is indefensible in this: it follows the *Bartlett* case in the misapprehension of the *Tiger* case and announces first of all, attempting to follow the *Bartlett* case, that after the Indians have received both the equitable and legal titles to their allotments it is impossible for Congress to vary the restrictions, and the *Tiger* case is cited as an authority upon this fundamentally erroneous proposition. In short, the Circuit Court

of Appeals started out upon the theory that Congress could not vary the restrictions after both the equitable and legal title had passed in direct conflict with the holding of this court in the *Tiger* case. But by inadvertence the Circuit Court of Appeals fell into error in the application of the rule which it announced as fundamental, in this: the allotment there made was selected in the year, 1904, the citizen for whose heirs it was selected having died in 1903, and the patent was issued on the 28th day of April, 1908. It was, therefore, an allotment made to the heirs, and it was taken unrestricted but for the act of April 26, 1906. It should be noted that the act of April 26, 1906, became a law prior to the approval of the patent by the Secretary of the Interior and prior to the date that it became effective, so that *the legal title had not passed from the Government and the Creek Nation on April 26, 1906, and to apply the reasoning of the Circuit Court of Appeals to this state of facts it was necessary to hold that Congress had the power to vary the restrictions upon the land, the legal title not having already passed. It will probably be conceded that prior to the passing of the legal title while same remains in the tribe with the ultimate title, however, in the Government, that Congress has the right to impose or vary restrictions covering said land, the government not having yet parted with the title.* This proposition is amply

sustained both by reason and by authority as we shall show under Proposition II, at number 5, where we discuss the constitutional point presented in the light of the cases of *Bartlett v. United States*, *Sunday v. Mallory*, and other cases relied upon by plaintiff in error. Before passing the case of *Sunday v. Mallory* as same may bear upon the question of construction, we cannot refrain from asserting most respectfully but positively that if the Circuit Court of Appeals had applied the rule which it announced it must have held that the act of April 26, 1906, imposed restrictions upon the lands involved in the case of *Sunday v. Mallory*, the legal title not having passed until after the act.

The case of *Heit*, 197 U. S. 488, 49 L. ed. 848, the principal reliance of those who claim that section 22 of the act of April 26, 1906, should not be construed as applicable to lands theretofore unrestricted, was expressly repealed by the case of *United States v. Nice*, 241 U. S. 591, 60 L. ed. 1192.

The other cases cited upon behalf of plaintiff in error as supporting his contention as regards construction have been so ably reviewed and distinguished by the Supreme Court of Oklahoma in its opinion in this case, *Brader v. James*, 154 Pac. 560, and in *Moffett v. Conley*, 163 Pac. 118, and *Cushing v. Whaley*, 165 Pac. 135, that we deem it unnecessary to discuss this phase of the case further.

PROPOSITION II.

The provision at section 22 of the Act of Congress of April 26, 1906, that "all conveyances * * * by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior," construed as applicable to all allotted lands in the hands of full-blood Indian heirs, whether theretofore restricted or unrestricted, is well within the constitutional power of Congress.

(1) Section 22 of the act of April 26, 1906, provides merely a *reasonable procedure* for the alienation by full-blood Indian heirs who are wards of the Government, of their inherited lands, and does not prohibit the alienation thereof nor does it impair any property rights or contractual relations. The grantee of an Indian cannot avail himself of the Indian's right, if any, to assert the unconstitutionality of section 22. This regulation is *personal*—upon the full-blood Indians.

—*Richard v. Parker*, 245 Fed. 330:

Williams v. Johnson, 239 U. S. 414, 60 L. ed. 358;

Tiger v. Western Inv. Co. 221 U. S. 286, 55 L. ed. 738;

Smith v. Stephens, 10 Wall. 321, . . L. ed. . . . ;

Chupko v. Chapman, 4 Okla. App. Ct. Rep. 339, decided October 2, 1917, not yet officially reported;

Sec. 9, Act of May 27, 1908 (34 Stat. 145).

Wilson v. Morton, 29 Okla. 745, 119 Pac.
213.

We contend that it is not necessary in this case to decide whether or not Congress had the power to prohibit the alienation of the lands here involved because the act does not purport to do more than to provide *the procedure* for the sale of such lands. While we believe that Congress had the power to prohibit the conveyance of such lands by full-blood Indian heirs, and contend that if that point is in the case and must necessarily be decided, that the court should hold that Congress both intended to prohibit conveyances and had the constitutional power to do so. But we shall here concede, for the sake of argument only, that Congress did not have the power to prohibit the sale of such lands in the hands of full-blood Indian heirs, which leads to a consideration of this proposition: *Is the procedure provided for such conveyances so unreasonable as to prohibit sale?* It must be presumed that the Secretary of the Interior would not act arbitrarily but that he would act only in the interest of the Indians. It must be presumed that he would approve any sale *not improvidently made*. Therefore, the regulation is a reasonable one. It can hardly be doubted that Congress both intended to provide a *procedure* for the

sale of such lands and that it had the power to so provide. This legislation was prior to statehood. There was no local law making body to provide safeguards for the benefit of the full-blood Indians in matters of their conveyances. The antiquated laws of conveyance which were in force in the State of Arkansas in the year 1884 as same were contained in Mansfield's Digest of the Laws of Arkansas, together with other Arkansas statutes, had been extended in force in the Indian Territory insofar as the same were not in conflict with acts of Congress and were not locally inapplicable. Congress had with respect to the Indians and their lands not only the powers which a state ordinarily has over its citizens and their lands, but the further plenary power sufficient to accomplish the purposes of its guardianship extending over the Indians personally and their property. This plenary power was manifested in many ways, as we show elsewhere in this brief, and as this court has often held. One evidence of this plenary power over these full-blood Indians into whose hands inherited lands had come, was the restriction against alienation covering the lands allotted to them in their own right. The *Bartlett* case and *Sunday v. Mallory*, by the Circuit Court of Appeals, proceed upon the theory that to require the approval of the Secretary of the Interior in such a matter where restrictions had theretofore been removed would be to

prohibit a sale of the lands. This is clearly erroneous. The provision requiring the approval of the Secretary of the Interior is analogous to a state law, and there are many such in various states, requiring the spouse to approve a conveyance of the family homestead. The State of Oklahoma has such a law. Neither husband nor wife can make a deed of any validity to the family homestead property, which is very extensive in the State of Oklahoma, without the approval of the spouse. *But this is not a prohibition against alienation of the homestead but rather a regulation for the sale thereof, a procedure without which a conveyance of the homestead is wholly void.* Such a state law is grounded in the dependence of the family on the one hand and the obligation of the state on the other to protect the family against improvident conveyances. The state owes this duty not only to the family but to the commonwealth, and, we may add broadly, to society. A will is a method of alienation. Almost all the states undertake to regulate the procedure by which wills may be made, and they are usually held to be invalid if the procedure provided by state law is not followed substantially. At section 23 of the act of April 26, 1906, Congress provided generally, with respect to all full-blood Indians and with respect to all of their allotted lands, whether the same were theretofore restricted or unrestricted, a procedure for the making of wills

without which procedure such wills are void. It was required that a will by a full-blood Indian which dis-inherits the parent, wife, spouse, or children shall be void unless acknowledged before and approved by a judge of the United States Court for the Indian Territory or by a United States commissioner. The act of May 27, 1908, provided that such acknowledgment and approval might be made and had before a county judge of the State of Oklahoma. This is merely *procedure*. *No person has any vested rights in any procedure, whether it relates to matters in court or to the method for the sale of property.* Since the state in the exercise of its sovereign power over its citizens and their property may lawfully provide a *reasonable procedure without which conveyances in the state are void, for a greater reason may the Federal Government provide for its wards an exclusive procedure for the sale of their lands.* In this connection it should be remembered that this legislation was prior to statehood, and that *it does not purport to affect any property of the Indians except that received through the great allotment scheme from the tribes to which these Indians belonged.* It is suggested upon behalf of plaintiff in error that if Congress may make such a regulation as applicable to allotted lands that it has the power to pass similar legislation affecting lands which the Indians may have acquired by their own industry. The answer to

this suggestion is not difficult. The control of property which Indians have acquired by their own industry has never been undertaken by the Federal Government. Such control is entirely outside of the well-known scope and general policy and spirit of the guardianship over these Indians.

This attitude of the Government toward the Indians, their tribal relations and property is perhaps better described as a policy than as a guardianship, and the limits of this policy, its extent, the field for its operation, must be discovered in the laws of Congress, for there only do we find the conclusive evidences of the Government's Indian policy. It has often been held by this court that it rests with Congress alone to determine the extent of this policy, the field for the operation of the same and the time when the same ends as *respects any Indian* or any particular property or any tribe. The plaintiff in error cannot prevail in this case unless the court strikes down this governmental policy against the expressed intention of Congress. If it should be held that this regulation is such as to prohibit sales we insist that the plenary power of Congress was ample to accomplish this. But we earnestly insist that Congress provided *only a regulation, a reasonable procedure*. We apprehend that it must be conceded upon behalf of the plaintiff in error that the procedure is reasonable, that it will work out good for the Indians, that it will do nobody

any harm. We find no support in any of the authorities cited upon behalf of the plaintiff in error sustaining the proposition that Congress was without authority to impose a reasonable procedure for the sale of Indian lands, in the hands of wards of the Government. At the date of that act Congress alone had authority to provide means, methods and regulations for the sale of property owned by the white people in the Indian Territory. Clearly our opponents have proceeded to set up a "straw man" by their assumption that Congress prohibited conveyances of lands of this character. Since Congress in no manner sought to prevent the sale of the lands by section 22, but rather sought to safe-guard the sales to be made by a procedure which appeals to all right thinking persons, we are unable to see how any constitutional question is really involved.

In the *Tiger* case this court intimated that perhaps a grantee of an Indian could not avail himself of the Indian's right, if he had any, to assert the unconstitutionality of the act of April 26, 1906, which increased the period of restrictions upon certain classes of Indian lands, and this intimation was doubtless made upon the theory that *the grantee may not question the reasonableness of the exclusive procedure provided for said conveyances.*

In *Williams v. Johnston*, 239 U. S. 414, 60 L. ed. 358, this court said on this point:

“A question was intimated in the *Marchie Tiger* case whether a grantee of an Indian could avail himself of the Indian's right, if he had any, to assert the unconstitutionality of an act of Congress, and it is still more questionable whether plaintiffs in error can be heard to urge the rights of the Choctaw and Chickasaw Nations. However, we may reserve opinion. These nations are not parties to this suit and no contract rights of Taylor have been violated.”

In *Wilson v. Morton*, 29 Okla. 745, 119 Pac. 213, the Supreme Court of Oklahoma treated the provision at section 22 of the act of April 26, 1906, for the approval of conveyances by the Secretary as a mere *procedure* to be followed in the making of such a sale, saying on this point:

“The trial court took the view that said section 22 fixes within its own terms *the procedure to be followed in making a sale* thereunder and that no other statute has any application thereto. In that view we concur. * * * Congress by this statute intended to and did remove all restrictions upon the alienation of lands inherited from deceased Indians of the Five Civilized Tribes in the hands of adult Indians which had been placed thereon by the various acts and treaties of Congress with the Indian Tribes. It authorized all such adult heirs except those of fullblood, to sell their inherited lands without the approval of any one, but fullblood adult heirs could convey only with the ap-

proval of the Secretary of the Interior." (Italics ours).

In *Richard v. Parker*, 245 Fed. 330, the Circuit Court of Appeals, Eighth Circuit, the act requiring the approval of a conveyance by a full-blood Indian of the Five Civilized Tribes was treated merely as providing a procedure. In discussing this point the court said:

"The death of an allottee removes all restrictions over the alienation of his land other than a homestead, except that no conveyance of any interest in the land by a full-blood Indian heir is valid unless approved by the proper probate court."

In *Chupke v. Chapman*, decided by the Supreme Court of Oklahoma October 2, 1917, not yet officially reported, and which appears in the Oklahoma Appellate Court Reporter, Vol. 4, at page 339, the Supreme Court of the State adhered to the view that the provision requiring the Secretary to approve conveyances by full-blood Indian heirs was merely one of procedure, saying, among other things, on this point:

"This court in an opinion by Mr. Justice HAYES, in the case of *Wilson v. Morton, et al*, 29 Okla. 745, 119 Pac. 213, held that the *procedure* for the sale of inherited lands as provided by said act was exclusive. * * *"

In the *Chupko* case in the course of its discussion of the guardianship of the Government over the persons of the Indians, the State Supreme Court said :

“While many of the adjudicated cases have not drawn the distinction, it has long been recognized by the courts that restrictions on alienation may be either personal to the allottee or run with the land. *Oliver v. Forbes*, 17 Kan. 113; *Farrington v. Wilson*, 29 Wis. 383; *Boling v. United States*, 233 U. S. 528; *Commrs. of Miami Co. v. Breckinridge*, 12 Kan. 114; *Gannon v. Johnston*, 40 Okla. 695, 243 U. S. 108; *McMahon v. Welch*, 11 Kan. 280. All of the above cases recognize the distinction between the two classes of restrictions and define the scope of the restrictions according to the language of the enactment or patent under consideration.”

The regulation at section 22 is *personal—upon the Indian*—in an important aspect. It was placed on the fullblood as a ward of the United States. It would not follow the land except in the hands of fullbloods. This discussion by the State Supreme Court clearly recognizes that this procedure for the sale of lands in the hands of full-blood Indian heirs was enacted by Congress *in the exercise of its guardianship over the full-blood Indians as persons*.

The very language of section 22 shows that it was not intended as an inhibition against the sale of inherited lands but rather to provide the procedure

for the conveyance thereof. The language "the adult heirs of any deceased Indian of either of the Five Civilized Tribes * * * may sell and convey the lands inherited from such decedent," was intended to remove all restrictions in the ordinary meaning of the term restrictions as theretofore applied to Indian lands in the Indian Territory, and the latter part of the act was intended to provide the exclusive procedure or method for the sale of all such inherited lands. The *Tiger* case supports this view.

(2) The authority of Congress to provide this exclusive procedure found at section 22 of the act of April 26, 1906, for the sale of allotted lands in the Indian Territory in the hands of fullblood heirs is found in the guardianship of the government over *the persons of the Indians*, their tribal relations and property, but primarily in the guardianship of the Government over the *Indians personally*.

—*Tiger v. Western Inv. Co.*, 221 U. S. 286,
55 L. ed. 738;

Williams v. Johnston, 239 U. S. 414, 60 L.
ed. 358;

Oklahoma Enabling Act, 34 Stat. L. 267;

United States v. Celestine, 215 U. S. 290,
54 L. ed. 195;

United States v. Kagama, 118 U. S. 375, 30
L. ed. 228;

United States v. Sandoral, 231 U. S. 28, 58 L. ed. 107;

United States v. Pelican, 232 U. S. 442, 58 L. ed. 676;

Perrin v. United States, 232 U. S. 478, 58 L. ed. 691;

Ex Parte Webb, 225 U. S. 663, 56 L. ed. 1248.

in *United States v. Celestine*, *supra*, the court said:

“In passing the Enabling Act for the admission of the State of Oklahoma, where these lands are, Congress was careful to preserve the authority of the Government of the United States *over the Indians*, their lands and property which it had prior to the passage of the act, June 16, 1906 (34 Stat. 267, c. 3335).” (Italics ours).

It is for the reason that Congress has retained its control *over the Indians themselves* as well as their lands and property that the Supreme Court reached its conclusion in *Ex parte Webb*, *supra*.

In the *Kajama* case, *supra*, this court said:

“From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and in the treaties in which it has been promised, there arises the duty of *protection*, and with it the *power*.”

It is in the exercise of the power referred to in the *Kagama* case that Congress corrected the mistakes of its legislation prior to April 26, 1906, whereby Congress had given to the full-blood Indians a greater degree of freedom without supervisory control in the matter of the sale of their inherited lands than they were able to exercise prudently. Take the case of the grantor here. The government had not relinquished its power over the Indian himself. The full-blood Indian belongs to a tribe of Indians. When the restrictions were originally imposed upon Indian lands in the Indian Territory they did not rest upon the proposition that the lands were theretofore alienable. *The right of the government to impose restrictions upon its wards never depends upon existing restrictions upon the lands affected by the legislation.* The power to pass such legislation does not spring from nor does it depend in any manner upon existing restrictions. The courts have never placed the power upon that ground but rather in the guardianship of the Government over the Indians which carries with it at least the right to impose reasonable regulations to safeguard the Indians against their improvidence in the matter of the disposition of their lands which are not acquired by their industry but rather through the beneficence of the Government. So long as the guardianship of the Government continues over the Indians as such

and over their tribal relations, beyond doubt reasonable legislation to protect the wards of the Government against their own improvidence is well within the constitutional powers of Congress. This power is found in the doctrine of necessity.

(3) This case is not distinguishable from *Tiger v. Western Inv. Co.*, 221 U. S. 286, 55 L. ed. 738, for the power exercised by Congress in the enactment of section 22 is precisely the same power which resulted in the enactment of section 19.

The only distinction between this case and the case of *Tiger* is that there the old restriction still had some months to run before the new restriction imposed by section 22 commenced to operate, whereas in this case the old restriction had expired some time before the approval of the act declaring the new restriction or regulation. In legal contemplation this does not constitute a difference. In the *Tiger* case the land was originally subject to the five-year restriction imposed by section 16 of the Supplemental Creek Agreement of June 30, 1902. Tiger was a full-blood Creek and had inherited the allotment in 1903. But for the restriction contained in section 22 he could have made a conveyance without approval on or after August 8, 1907, the day after the expiration of the five-year period. On August 8, 1907, he made the conveyance attacked in the *Tiger* case. But it was

held that section 22 of the act of April 26, 1906, had not impaired his rights as a citizen of the United States, had not impaired any contractual obligations, and that the same did not constitute a burden upon his title but was rather a safeguard to protect him, and this safeguard was treated as a regulation of the procedure for the sale of his land. The restriction was sustained not on the ground that when the act was passed the land was still within the restriction period theretofore imposed, but because of the guardianship of the Government over the person of Marchie Tiger, a ward of the Government, and over the Creek Tribe of Indians. In the excellent brief filed in this court by the Government in the case of *United States v. Bartlett*, No. 251, October term 1914, this point was made in the following language, which we are pleased to quote.

“It is almost too manifest to excuse the saying that the existence of such a guardianship as is intended by the opinion in the *Tiger* case and the other opinions above cited, could not be made to depend upon the existence of a particular restriction upon a particular piece of land. If the relations of the Indian to the Government were the same as those of the white man in every respect save for the bare existence of the restriction upon his title, the restriction could not be constitutionally enlarged without the Indian's consent, simply because, being fully *sui juris* himself, his power to dispose of the allotment would

be absolutely measured by the terms of his deed, and any attempt to vary those terms would be a clear invasion of his property. It would, of course, be absurd to say that the authority to vary the restriction is conferred by the restriction itself. One might as well affirm that black is white, as argue that a deed or patent purporting to convey a fee simple title subject only to a condition that the land shall remain inalienable during a specified number of years, reserves authority in the grantor to extend the period of restraint. If, therefore, the power that was applied in the *Tiger* case is not to be derived from the restriction itself, but must come from a guardianship of which the restriction is merely one evidence, it must follow that the existence of the restriction is wholly immaterial to the application of the power.

“Let us test this proposition somewhat. It is well understood that the powers and duties of the General Government respecting the Indians arise not only from the express constitutional power to regulate commerce with the Indian tribes, but also out of the peculiar relationship of dependency and control which has always existed between the Indians and the United States through the compulsion of circumstances. (*United States v. Kagama*, 118 U. S. 375, 384; *United States v. Sandoval*, 231 U. S. 28, 46.) As this court observed in the case of *Kagama*:

“From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the

treaties in which it has been promised, there arises the duty of protection and with it the power (p. 384).

“What power? We answer our own question by saying: A power adequate to the occasion. If, while an Indian remains a ward of the Nation, Congress makes a gross mistake in giving him full control over property essential to his welfare, but which he is no more fitted to protect and dispose of properly than a child would be, is Congress impotent to correct this mistake for the protection of the Indian and the National honor? If so, what has become of the guardianship?

“We have been told repeatedly that the national guardianship over these Indians, citizenship or no citizenship, has not ceased and will not cease until Congress shall deliberately and unequivocally put an end to it.”

The Oklahoma Enabling Act, 34 Stat. L. 267, provides, referring to the Oklahoma Constitution, that

“Nothing contained in the State Constitution shall be construed to limit or impair the rights of persons or property pertaining to the Indians in said Territories (so long as such rights shall remain unextinguished), or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law or otherwise.”

This language of the Enabling Act shows that Congress *had not intended to relinquish guardianship over the Indians*, their lands or property. Let us examine, briefly, some of the evidence showing the continuance of the Government's guardianship over the full-blood Indians of the Five Civilized Tribes. All the tribal governments still exist. Every Indian has his tribal relations. Congress has never relinquished its guardianship over the tribal relations of the Indians and the matters relating thereto. These full-blood Indians, subject to the regulation found at section 22, are restricted in the matter of the alienation of the allotments which they received in their own right. The Government still enforces laws long ago enacted prohibiting the introduction and sale of intoxicating liquors in the territory formerly constituting the Five Civilized Tribes. In order to protect the Indians against intoxicants the Government rigidly enforces the prohibition law throughout the east half of the state, regardless of the question as to whether it is likely to fall into the hands of Indians. In order to s a f e g u a r d the Indians against intoxicants the Government regulates, as regards intoxicants all of the white people who live in the territory formerly Indian country. There is maintained at Muskogee by the United States a great Indian office, with hundreds of employes, whose duties consist in supervising the Indians and their

property. There are field clerks, and probate attorneys throughout the Five Tribes. The county courts have been constituted by section 9 of the act of May 27, 1908, agencies of the Government to supervise the conveyances of full-blood Indian heirs. Let it be granted, for the sake of argument, that the guardianship of the Government over this particular property had been relinquished. *It remained over the Indian heirs, and out of the power of the Government to protect these Indian heirs and in the course of its guardianship of the Indians the United States had the right to impose a restriction or regulation on these wards in the matter of their conveyances.* Section 19 of the act of April 26, 1906, which imposes restrictions upon certain lands of full-blood Indians which they had received as parts of their individual allotments must fail of its purpose unless the power of Congress in this respect is commensurate with its intention. With reference to section 19, in the brief by the Government to which we have already referred in the *Bartlett* case, at page 43 this language is used, which we desire to approve:

“When that act was passed many members of the Choctaw and Chickasaw Tribes had received patents for their allotments (see Report of the Secretary of the Interior for 1904, pt. 2, pp. 37 to 41), and, by the Choctaw-Chickasaw agreement, ratified by the act of July 1, 1902, *supra*, members of these tribes, fullbloods as

well as others, were authorized to sell one-fourth of their surplus in one year and one-fourth in three years from the date of patent; consequently, on April 26, 1906, a portion—at least one-half or one-fourth—of these lands was alienable, while other portions remained inalienable. We may say parenthetically that it has never been contended that after the passage of the act of that date any of the lands allotted to fullbloods remained alienable, and, of course, if Congress had authority to reimpose a restraint upon the alienation of the lands of fullbloods there was equal authority in respect of the lands of mixed bloods. The *Mullen* case involved a sale by a Choctaw fullblood which had occurred before the act of 1906. This court, while finding that no restriction existed at the time of the sale, took pains to point out that the sale antedated the act, and observed (p. 457), that when the sale was made 'the heirs of the fullblood taking under the provisions of paragraph 22 of the supplemental agreement had the same right of alienation as other heirs'."

In *Heckman v. United States*, 224 U. S. 413, 56 L. ed. 820, the validity of section 19 was squarely sustained in the course of the court's argument, where it was said, referring to the *Tiger* case:

"The reasoning of this decision is conclusive as to the validity of the extension by section 19 of the act of 1906 of the period of inalienability of lands allotted, as in this case, to fullblood Cherokees."

If, indeed, this case presents an open question, it is the most important one presented to the Supreme Court since the *Tiger* case, for unless the State Supreme court is sustained thousands of full-blood Indians in the Five Civilized Tribes will be without adequate protection not only as to their inherited lands but as to their individual allotments. For illustration, if the more improvident fullbloods of the Chickasaw and Choctaw Nations, parts of whose surplus allotments were unrestricted before the act of April 26, 1906, are permitted to convey without any supervision one-fourth or one-half of their surplus allotments in acreage, they will convey the more valuable parts, leaving themselves impoverished, thereby bringing about the very conditions that sections 19 and 22 were intended to prevent. We cannot believe that this court will hold that the guardianship of the Government over these full-blood Indians is so impotent as to make it impossible for Congress to correct its mistakes. To strike down the decisions of the state courts which have construed these laws so as to protect these Indians would be to bring to these wards of the Government overwhelming disaster. If either the question of construction or constitutional power is in doubt it should be resolved in the interest of the Indians. Many thousands of Indians will be affected by the decision in this case. That they cannot protect themselves without the supervisory control of the

county courts or of the Secretary of the Interior is now a well known fact of history.

(4) The question whether Congress has the power after the admission of the Indian Territory into the new State of Oklahoma to impose restrictions so as to withdraw the lands from taxation and the burdens of state government, does not here arise.

The new State of Oklahoma was erected November 16, 1907. Since statehood Congress has not attempted to impose or extend restrictions or to provide any regulations which would interfere in any manner with the free conveyance of Indian lands. As was said in the *Bartlett* case by this court, the Act of May 27, 1908, expressly declared that the act should not be construed as imposing restrictions. But there is no such provision in the Act of April 26, 1906, and the early act must be construed without reference to statehood or questions of taxation.

(5) As to the *Bartlett* case, we have already shown, *first* that the opinion of the court both upon the question of construction and the constitutional point suggested was *dictum* in its entirety, and *second*, that the learned court misunderstood the facts of the *Tiger* case, inadvertently holding that the power to extend the restrictions found in the *Tiger* case arose from the trust relation between the government and

the Indians, assuming, as the Court of Appeals did, that the full equitable and legal title had not passed, *though in fact the patents to the land had been issued and delivered in the Tiger case.* The *Bartlett* case therefore may be wholly disregarded as an authority upon the constitutional question under discussion. The subsequent case of *Sunday v. Mallory*, by the Circuit Court of Appeals, Eighth Circuit, following the *dictum* in the *Bartlett* case, illustrates how a great and learned court may fall into grave error by mere misapprehension of the things for consideration in an Indian case. Undertaking to follow the *Bartlett* case, the court laid down a proposition we respectfully submit utterly impossible of defense namely: that in the *Tiger* case the power of Congress to extend restrictions was sustained by this court because the equitable and legal title had not passed. Though the Court of Appeals misunderstood the facts of the *Tiger* case, it did announce a correct rule of law in holding that the government can impose restrictions upon Indian lands at any time prior to the passing of the legal title from the government. But this rule stated by the Circuit Court of Appeals, insofar as correct, is but one application of the broader rule found in the *Tiger* case. The rule as announced in the *Sunday-Mallory* case if applied to the plain facts of that case, must have resulted in holding that the land was restricted because *the legal*

title had not passed. The citizen had died in 1903; the selection of the allotment was made in 1904. The patents were issued March, 1908, and approved by the Secretary April, 1908. Clearly, therefore, the legal title to the land was in the tribe and in the United States when the Act of April 26, 1906, became a law. In *Sunday v. Mallory* it is said, in effect, that the restrictions in the *Tiger* case were sustained because the legal title had not passed at the time the law was enacted. We suppose it will be conceded, for whatever light it may throw upon this case, that where the legal title had not passed to an allottee on April 26, 1906, that the act operated to impose a restriction or regulation in the matter of the sale of said land though the land was theretofore unrestricted; for clearly so long as the government has not parted with the legal title it has the power to attach such conditions to or restrictions upon the title as in the judgment of Congress will properly protect the Indian against his improvidence. We understand that the case of *Sunday v. Mallory* is now upon appeal in this court, and since the plaintiff in error apparently considers it his only authority, it may not be amiss to further examine the proposition suggested in *Sunday v. Mallory* but which by error was not applied there, namely, that the government may impose restrictions upon Indian lands at any time prior to the passing of the legal title. It has been

suggested that the decision of the State Supreme Court might be sustained in this case, and that *Sunday v. Mallory* where the land was held to be alienable without approval might also be affirmed upon the ground that the land here involved was once restricted prior to the Act of April 26, 1906, whereas that land in the *Sunday-Mallory* case having been allotted to the heirs was never restricted prior to April 26, 1906. On the other hand, it has been suggested that the homestead here involved might be held to be unrestricted and the State Supreme Court reversed and the land involved in *Sunday v. Mallory* held as restricted within the provisions of section 22 of the Act of April 26, 1906, and section 9 of the Act of May 27, 1908, because *the legal title* to the land involved in the *Sunday-Mallory* case passed after the Act of April 26, 1906. And in support of the latter suggestion various cases are cited, such as *United States v. Gardner*, 66 C. C. A. 663, where it was held "While the legal title remains in the United States the grant is in process of administration," and in the case of *Starr v. Long Jim*, where Long Jim attempted to convey his land prior to patent, the Supreme Court made reference to the fact that the title had not issued but was retained by the United States, saying: "The title to the lands in question was retained by the United States for reasons of public policy and in order to protect the Indians against their own im-

providence." In the case of *Bruner v. Nordmeyer*, (Okla.) 166 Pac. 126, where a title like that involved in *Sunday v. Mallory* was involved, the Supreme Court of the state held a conveyance by a full-blood Indian heir void upon the authority of prior decisions of the state court, citing *Brader v. James*, and other cases, and the further suggestion was made "there may be an additional reason for holding the deed in the instant case void, in this: the allotment was made in October, 1906, after the Act of Congress of April 26, 1906, went into effect." *Whatever may be the final disposition of this case the land involved in Sunday v. Mallory must be regarded as restricted in the sense that it requires the approval of the County Court in order to validate the deed.* Whilst the equitable title to the allotment passed to the heirs upon the selection of the land and the issuance of the allotment certificate, the legal title was still within the control of Congress in an important sense, the ultimate title was yet in the United States subject to the Indian title and the interest of the United States in the land, coupled with the governmental guardianship over the Indians, was such that certainly Congress had the authority to impose restrictions upon the land prior to the issuance of the patent. We believe that *Brader v. James* and *Sunday v. Mallory* involve the same principle, and that it should be held in both cases that approval is necessary for the validity of the conveyances.

The appellant relies upon the argument made by the learned Justice HARDY in his dissenting opinion in this case, but we respectfully submit that his opinion loses its force when it is considered, *first*, that the principal case upon which he relied, *Re Heff*, has been overruled by this court since the learned justice wrote his dissenting opinion, and *second*, he erroneously adopted the view that the imposition of restrictions or regulations for the sale of land deprives the owner of a property right, which view is in direct conflict with the opinions of this court, particularly the recent case of *Williams v. Johnston*, 239 U. S. 414, 60 L. ed. 358. In the *Williams* case it was contended that legislation by Congress in respect to restrictions upon Indian lands affects or impairs the property rights of the Indians, and in support of this contention *Choate v. Trapp* was cited. But this court disposed of that contention as follows:

“It is conceded by plaintiffs in error that an Act of Congress can supersede a prior treaty, but they insist that it is well settled ‘that Congress is without power to change a contract or agreement for a valuable consideration with an individual Indian allottee.’ *Choate v. Trapp*, 224 U. S. 665, 56 L. ed. 941, 32 Sup. Ct. Rep. 565, and *Jones v. Meehan*, 175 U. S. 1, 44 L. ed. 49, 20 Sup. Ct. Rep. 1, are cited, and incidentally *Marchie Tiger v. Western Invest. Co.*, 221 U. S. 286, 55 L. ed. 738, 31 Sup. Ct. Rep. 578, and *Mullen v. United States*, 224 U. S. 448, 56 L. ed. 834, 32 Sup. Ct. Rep. 494.

“The cases do not apply. It has often been decided that the Indians are wards of the nation, and that Congress has plenary control over tribal relations and property, and that this power continues after the Indians are made citizens, and may be exercised as to restrictions upon alienation. *Marchie Tiger v. Western Invest. Co., Supra.* Against this ruling *Choate v. Trapp* does not militate. In the latter case it was decided that taxation could not be imposed upon allotted land a patent to which was issued under an Act of Congress containing a provision ‘that the land should be non-taxable’ for a limited time; and, excluding the application of the *Marchie Tiger* case, it was said that exemption from taxation ‘and non-alienability were two separate and distinct objects.’ And further, ‘One conveyed a right and the other imposed a limitation.’ The power to do the latter was declared, and it was said ‘the right to remove the restriction (limitation upon alienation) was in pursuance of the power under which Congress could legislate as to the status of the ward, and lengthen or shorten the period of disability. But the provision that the land should be non-taxable was a property right, which Congress undoubtedly had the power to grant. * * * ’”

In *Wiggan v. Conolly*, 163 U. S. 56, 41 L. ed. 69, this court sustained an Act of Congress similar to section 22 of the Act of April 26, 1906, and it was there held that the fact that a patent had issued to the allottee did not abridge the right of the United

States to add a new limitation to the power of the Indian in respect to alienation.

The other cases cited upon behalf of plaintiff in error which we have not reviewed in detail are analyzed by the Supreme Court of the state, and shown to be not in point. See *Brader v. James*, 154 Pac. 560; *Moffett v. Conley*, 163 Pac. 118, and *Cushing v. Whaley*, 165 Pac. 135.

(6) The questions here involved have been decided by the Supreme Court of Oklahoma many times, the reasons for which appear in full in *Brader v. James*, 154 Pac. 560; *Moffett v. Conley*, 163 Pac. 118, and *Cushing v. Whaley*, 165 Pac. 135. See the following cases:

- Brader v. James*, 154 Pac. 560;
- Sampson v. Staples*, 155 Pac. 213;
- McCosar v. Chapman*, 157 Pac. 1059;
- Moffett v. Conley*, 163 Pac. 118;
- Cushing v. Whaley*, 165 Pac. 135;
- Bruner v. Nordmeyer*, 166 Pac. 126;
- Sampson v. Smith*, 166 Pac. 422;
- Lula v. Powell*, (Okla.) 166 Pac. 1050;
- Chupko v. Chapman*, 4 Okla. App. Rep. 339,
Oct. 2, 1917 (not yet officially reported).

The argument of the Supreme Court of the State of Oklahoma in this case is so well grounded

in reason and so amply supported by the authorities cited that we shall end our discussion with the following by Justice SHARP:

“Passing to the question of the constitutionality of the act, we refer again to the opinion in *Tiger v. Western Investment Company*. There, Marchie Tiger, the full-blood Creek heir, had sold and conveyed the allotted lands inherited by him, after the expiration of the 5-year restriction period. It was held by the court that the rights of the Creek Indians, who were made citizens of the United States by the Act of March 3, 1901 (31 Stat. at L. 1447, c. 868), with all the rights, privileges, and immunities of such citizens, were not unconstitutionally impaired by the Act of April 26, 1906, paragraph 22, extending the prohibition against the alienation of allotted lands by the allottee or his heirs without the approval of the Secretary of the Interior, created by the Creek Supplemental Agreement of June 30, 1902, beyond the 5-year limitation therein named. In considering this subject we must remember that the Congress of the United States has undertaken from the earliest history of the government to deal with the Indians as a dependent people, and to legislate concerning their property with a view to their protection as such dependents. *Cherokee Nation v. Georgia*, 5 Pet. 1, 17, 8 L. ed. 25, 31; *Stephens v. Cherokee Nation*, 174 U. S. 445, 484, 19 Sup. Ct. 722, 43 L. ed. 1041, 1055; *United States v. Kagama*, 118 U. S. 375, 6 Sup. Ct. 1109, 30 L. ed. 228; *Lone Wolf v. Hitchcock*, 187 U. S. 565, 23 Sup. Ct. 216,

47 L. ed. 306. And we may say, further, that the power of the general government to deal with, control, and protect the property of Indians, where not expressly abandoned, may not fairly be open to controversy. Arising originally out of the necessities of the situation, it now has the support of immemorial legislative and executive usage, and likewise that of judicial sanction, as evidenced in a long line of decisions of the Supreme Court. This power remains in full force and vigor until its further exercise is deemed unnecessary by those in whom it rests. *Worcester v. Georgia*, 6 Pet. 515, 8 L. ed. 483; *United States v. Rickert*, 188 U. S. 439, 23 Sup. Ct. 478, 47 L. ed. 536; *Wallace v. Adams*, 204 U. S. 420, 27 Sup. Ct. 363, 51 L. ed. 550, and cases last cited.

“On March 2, 1906, by joint resolution, Congress extended the tribal existence and government of the Five Civilized Tribes of Indians in the Indian Territory; and in section 28 of the very act under which it is provided that the deed of a full-blood Indian heir to inherited lands shall be approved by the Secretary of the Interior, and in less than 2 months after the passage of the joint resolution, Congress enacted that the tribal existence and the then present tribal governments to the Choctaw, Chickasaw, Cherokee, Creek and Seminole Nations were continued in full force and effect for all purposes authorized by law, until otherwise provided by law, with certain enumerated limitations upon the tribal authority. Neither this act nor the Act of May 27, 1908, evinced an intention on the part

of Congress to abandon or terminate the relation of guardianship over those whom it regarded as a dependent people, but on the other hand, manifested a purpose to continue that relation. Also, in passing the Enabling Act for the admission of the State of Oklahoma, Congress was careful to preserve the authority of the Government of the United States over the Indians, their lands, property or other rights, which it had prior to the passage of the act. 34 Stat. at L. 267, c. 3335. *Ex parte Webb*, 225 U. S. 663, 32 Sup. Ct. 842, 56 L. ed. 1248. As to both tribal unallotted lands and annuities, and otherwise, the government retained, and yet retains, the former control. This is also true in the matter of protecting the Indian in the lands from which restrictions have not been removed. Such was the conclusion of the Supreme Court in *Heckman v. United States*, 224 U. S. 413, 32 Sup. Ct. 424, 56 L. ed. 820, 829, where it is said by Mr. Justice HUGHES:

‘The placing of restrictions upon the right of alienation was an essential part of the plan of individual allotment; and limitations were imposed by each of the allotment agreements. The separate statutes were supplemented by the general Acts of 1906 and 1908, already mentioned. These restrictions evinced the continuance, to this extent at least, of the guardianship which the United States had exercised from the beginning. That the conferring of citizenship was in no wise inconsistent with the retention of control over the disposition of the

allotted lands was expressly decided in the case of *Tiger v. Western Inv. Co.*,¹ etc.

“See, also, *Wiggan v. Connolly*, 163 U. S. 56, 16 Sup. Ct. 914, 41 L. ed. 69; *Perrin v. United States*, 232 U. S. 478, 3 Sup. Ct. 387, 58 L. ed. 691; *Bowling v. United States*, 233 U. S. 528, 34 Sup. Ct. 659, 58 L. ed. 1080; *Jefferson v. Winkler*, 26 Okla. 653, 110 Pac. 755; *Texas Co. v. Henry*, 34 Okla. 342, 126 Pac. 224.

“Powers, rights, and interests of sovereignty are never relinquished by mere lapse of time or by implication. Once rightfully established and asserted, they are presumed to exist, and to continue to exist until abandoned by express terms. This principle applies alike to prerogatives of the executive powers of the legislative, and the jurisdiction of the courts. *United States v. Knight*, 14 Pet. 301, 10 L. ed. 465; *United States v. Herron*, 20 Wall. 251, 22 L. ed. 275. As expressed in *Wheeling & Belmont Bridge Co. v. Wheeling Bridge Co.*, 138 U. S. 287, 11 Sup. Ct. 301, 34 L. ed. 967:

‘An alleged surrender or suspension of a power of government respecting any matter of public concern must be shown by clear and unequivocal language; it cannot be inferred from any inhibitions upon particular officers, or special tribunals, or from any doubtful or uncertain expressions.’

“Construing section 7 of the Act of Congress of May 27, 1908 (32 Stat. at L. 275), authorizing the adult heirs of any deceased Indian, to whom allotted lands had been patented, to

sell inherited lands subject to the approval of the Secretary of the Interior, and providing that when so approved full title should pass to the purchaser, the same as if a final patent without restrictions on alienation had been issued to the allottee, the Circuit Court of Appeals, in *National Bank of Commerce v. Anderson*, 77 C. C. A. 259, 147 Fed. 90, in holding that the trust attached to the proceeds of the sale, said:

'We construe the act as expressing the intention of Congress, not to end the trust, but to permit a change of the form of the trust property. The property being held in trust by the United States for a period which had not yet expired, and which period was subject to * * * extension by the President, the intention to terminate the trust must be found to be clearly expressed in order to warrant us in holding that the trust does not follow the property in its changed form.'

'There Henry Taylor, the heir, though a citizen of the United States, was an Indian of the Puyallup Tribe. He lived his own independent life, had severed his tribal relation, and was neither dependent on the Government or under no official control.

'A very able opinion is that of Judge SANBORN in *United States v. Thurston County*, 143 Fed. 287, 74 C. C. A. 425, where, after referring to the fact that the Indian was also a citizen of the United States and of the State of Nebraska, it is said:

‘Their civil and political status, however does not condition the power, authority or duty of the United States to exercise its powers of Government to control their property, to protect them in their rights, to faithfully discharge its legal and moral obligations to them, and to execute every trust with which it is charged for their benefit. *Matter of Heff*, 192 U. S. 488, 509 (25 Sup. Ct. 506), 49 L. ed. 848; *Buster v. Wright*, 68 C. C. A. 505, 135 Fed. 947; *Wallace v. Adams*, 74 C. C. A. 541, 143 Fed. 716 * * * They are still members of their tribes and of an inferior and dependent race, of which the Supreme Court has said that “from their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the executive and by Congress, and by this court, whenever the question has arisen.” *United States v. Kagama*, 118 U. S. 375, 384 (6 Sup. Ct. 1109), 30 L. ed. 228.’

“We cite these two latter cases as authority upon the question that Congress has not terminated the relation of trust, but has, on the other hand, zealously continued its exercise.

“It is for Congress, and not the courts, to determine when and how the relation of guardianship shall be abandoned. As was said in *Tiger v. Western Investment Co.*, after review-

ing many former opinions of that court upon the subject :

‘Taking these decisions together, it may be taken as the settled doctrine of this court that Congress, in pursuance of the long-established policy of the Government, has a right to determine for itself when the guardianship which has been maintained over the Indian shall cease. It is for that body, and not the courts, to determine when the true interests of the Indian require his release from such condition of tutelage.’

“Also, as said in *United States v. Celestine*, 215 U. S. 278, 30 Sup. Ct. 93, 54 L. ed. 195, speaking to the question under consideration :

‘It is not within the power of the courts to overrule the judgment of Congress.’

“Whether the restrictions on alienation as provided in the Supplemental Agreement, under which the lands were allotted, had or had not expired does not of itself, and while the title remains in the Indian, determine that Congress has renounced its power to legislate in the latter’s behalf as a dependent. Upon this question we again quote from the *Tiger* case :

‘Upon the matters involved our conclusions are that Congress has had at all times, and now has, the right to pass legislation in the interest of the Indians as a dependent people ; and there is nothing in citizenship incompatible with this guardianship over the Indian’s lands inherited from allottees, as shown in this case ; that in the

present case, when the act of 1906 was passed, Congress had not released its control over the alienation of lands of full-blood Indians of the Creek Nation; that it was within the power of Congress to continue to restrict alienation by requiring, as to full-blood Indians, the consent of the Secretary of the Interior to a proposed alienation of lands such as are involved in this case; that it rests with Congress to determine when its guardianship shall cease, and while it still continues, it has the right to vary its restrictions upon alienation of Indian lands in the promotion of what it deems the best interest of the Indian.'

"The relation of guardianship between Rachel James and the general government did not depend upon whether the lands inherited by her were alienable at the time descent was cast. Neither was the power of Congress to impose restrictions made to rest upon there being restrictions in force at the time of the passage of the act. It is because of the relation of guardianship that at the time existed between the general government and Rachel James that Congress had the power to impose restrictions on her right to convey lands inherited by her. As was said in *Heckman v. United States*, *supra*:

'During the continuance of this guardianship, the right and duty of the nation to enforce by all appropriate means the restrictions designed for the security of the Indians cannot be gainsaid. While relat-

ing to the welfare of the Indians, the maintenance of the limitations which Congress has prescribed as a part of its plan of distribution is distinctly an interest of the United States. A review of its dealings with the tribes permits no other conclusion. Out of its peculiar relation to these dependant people sprang obligations to the fulfillment of which the national honor has been committed.'

“Until this guardianship has been unequivocally renounced, Congress could, in its wisdom, continue the exercise of its judgment in respect to the rights and privileges that should be accorded those of her class. The relationship being the source from which the power is derived, the imposition during its continuance of a new restriction stands upon the same ground as the extension of one yet in force. In other words, the existence of the right of guardianship cannot be made to depend upon the existence of a restriction on a particular piece of land. If the relations of the Indian to the government were, in every respect, save for the bare existence of a restriction upon his title, the same as those of a non-citizen white man, the restriction could not be constitutionally enlarged without the Indian's consent, because, being *sui juris* himself, his power to dispose of his allotment would be absolutely measured by the terms of his deed, and any attempt to vary those terms would be a clear invasion of his property rights. But it would be absurd to say that the authority to vary a restriction is conferred by a restriction. If,

therefore, the power is not to be derived from the restriction itself, but must come from the relation of guardianship, of which the restriction is merely one evidence, it must follow that the existence of the restriction is wholly immaterial to the exercise of the power. The power that is correlative to the duty of protection must be such as is adequate to the occasion. If, while an Indian remains a ward of the nation, Congress should make a gross mistake in giving him full control over property essential to his welfare, but which he is not fitted to protect, Congress, acting for him, and with a view to his protection, may correct the mistake, for, as already seen, the power of Congress is not alone dependent upon legislation being had while a limitation remains in effect. The guardianship is of the person as well as of the property. Hence the right to deal with the Indian liquor problem; the right to educate the Indians; to sell their unallotted lands, and to keep and pay out per capita the moneys derived therefrom, at will; to appoint probate attorneys; and generally to superintend, counsel, and guide them in their personal affairs. It is the government's peculiar function and duty to afford him protection. This he needs in respect of all his property. Congress, whenever it chooses, may renounce its control and its protective care over the individual. Until that is done, it is safe to assume that there is a reason for continuing the relation; that the Indian is not ready for complete liberation from restraint, and that whatever liberties or disposition over his property are allowed him from

time to time are in the way of experiments, subject to recall if found hasty and ill-advised. The restriction upon alienation is but one mode of exercising the general protective power over those Indians whom Congress may regard as dependent. The power to impose a restriction is entirely consistent with the possession by the individual Indian of rights which are constitutionally protected from interference by Congress. He may not be arbitrarily deprived of property, but the protection of his property is a legitimate and necessary exercise of the power of guardianship, subject to which his property is held; and the imposition of restraint upon his liberty of disposition is a necessary and legitimate means of protecting his property.

“Not only is this view borne out by the decision in the *Tiger* case, but in the early case of *Stephens v. Smith*, 10 Wall. 321, 19 L. ed. 933. In *Choate et al v. Trapp*, 224 U. S. 665, 32 Sup. Ct. 565, 56 L. ed. 941, the distinction between the right to exemption from taxation based on a sufficient consideration and the power of Congress to impose a limitation on alienation was expressly recognized. Meeting the contention of the state that the act of May 27, 1908, (35 Stat. at L. 312, c. 199), was not in fact a tax exemption, but was intended only to guard absolutely against alienation of the land, whether for taxes, or at judicial sale, or by private contract, or, differently expressed, that the tax exemption was only an additional prohibition against a sale, so that when the restrictions against alienation were re-

moved by the act, the provision as to non-taxability went as a necessary part thereof, it was said :

‘But the exemption and non-alienability were two separate and distinct subjects. One conferred a right and the other imposed a limitation * * * The right to remove the restriction was in pursuance of the power under which Congress could legislate as to the status of the ward and lengthen or shorten the period of disability. But the provision that the land should be non-taxable was a property right, which Congress undoubtedly had the power to grant.’

“It will be seen that the statute involved undertook to destroy this right by making lands from which restrictions had been removed, subject to taxation by the local taxing authorities. Section 22 contains no such provision, but, instead, requires that conveyances by full-blood Indian heirs shall be subject to approval by the Secretary of the Interior, under such rules and regulations as he may prescribe.

“We are not unmindful that the Court of Appeals, in *Bartlett et al v. United States*, 203 Fed. 410, 121 C. C. A. 520, held that it was not within the power of Congress to reimpose a restriction upon the alienation of land, against which none at the time existed. The *Bartlett* case did not involve the alienation of inherited lands, neither did it involve the relationship between the general government and full-blood Indians. Besides, the act under consideration was

that of May 27, 1908, which expressly excluded from its operation the imposition of restrictions removed from land by or under any law enacted prior to its passage. It was upon this ground that the decision was affirmed on appeal to the Supreme Court of the United States. *United States v. Bartlett et al*, 235 U. S. 72, 35 Sup. Ct. 14, 59 L. ed. 137. Section 9 of the latter act provided:

‘That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee’s land: *Provided*, that no conveyance of any interest of any full-blood Indian heir to such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee.’

‘The court, however, had before it for construction, section 1 of the act continuing restrictions upon the living allottees, to which was attached the proviso already referred to. While it was said by the court, referring to the former section:

‘If taken literally, the language which we have quoted from the act of 1908 is doubtless broad enough to impress all allotments of the class described, whether then subject to the original restriction or theretofore freed from it.’

—and it was held that, on account of the proviso, the language was not to be taken literally. Whether this proviso includes inherited lands named in section 9 of the act it is unnecessary to

consider, for we are not construing the latter act, but instead, in the respect mentioned, distinguishing it from the former. Whether in principle the *Bartlett* case may be distinguished from the one under consideration need not be considered or determined, for in the recent case of *United States v. Western Investment Company* (C. C. A.) 226 Fed. 726, it was held that, though the period for which the Creek agreement made a prior allotment to an Indian, confirmed thereby, alienable by the allottee or his heirs without approval of the Secretary of the Interior expired before enactment of the act of April 26, 1906, c. 1876, Sec. 22 (34 Stat. at L. 145), prohibiting fullblood heirs of a deceased Indian conveying his land without approval of such officer, a conveyance by such heir of such land after such enactment was subject thereto. In that case, according to the opinion, the lands inherited by the grantor, Mary Bird, a full-blood Creek Indian, were free of restrictions from the 1st day of March, 1906, until April 26th following. The opinion is rested upon section 22 of the act of April 26, 1906, requiring that conveyances by heirs who are full-blood Indians shall be subject to the approval of the Secretary of the Interior, and the decision of the Supreme Court in the *Tiger* case that Congress had not, by the Supplemental Creek Agreement, or by any other act, released its control over the alienation of full-blood Creek Indians, and that it was within its power to continue to restrict such alienation by requiring the approval of the Secretary of the Interior of conveyances made by them.

“In *United States v. Schock* (C. C.) 187 Fed. 870, it was said that it was within the power of Congress to impose restrictions upon the alienation of lands of Indian allottees, although restrictions imposed by prior legislation have expired by limitation. In *United States v. Allen*, 179 Fed. 13, 103 C. C. A. 1, it was held that it was within the power of Congress to enlarge the period within which an Indian allottee is prohibited from alienating his land beyond that imposed when the allotment is made, so long as the land is held by the allottee, although in the meanwhile he may have been made a citizen of the United States.

“Nor does the opinion in *Re Heff*, 197 U. S. 488, 25 Sup. Ct. 506, 49 L. ed. 848, announce a different rule. In that case, section 6 of the General Allotment Act of February 8, 1887 (24 Stat. at L. 388, c. 119), provided:

‘That upon the completion of said allotments and the patenting of the land to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside; and no territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law.’

“Heff was convicted in the United States Court in 1904, with having violated the act of Congress of January 30, 1897 (Stat. at L. 506, c.

109), by selling intoxicating liquors to one John Butler, a Kickapoo Indian, to whom certain lands had been allotted under the act of February 8, 1887. It was contended by the petitioner, in his application for a writ of *habeas corpus*, that the act of January 20, 1897, was unconstitutional, as applied to the sales of liquor to an Indian who had received an allotment and patent of lands under the provisions of the act of February 8, 1887, because it was provided in said act that each and every Indian to whom allotments had been made should be subject to the laws, both civil and criminal, in the state in which said allottee might reside, and, further, that said Butler, having received an allotment of land in severalty and his patent therefor under the provisions of the allotment act, was no longer a ward of the government, but a citizen of the United States and of the State of Kansas, and subject to the laws, both civil and criminal, of said state. After reviewing a number of the decisions of that court, pertaining to the relationship between the government and the Indians, and the rights and obligations consequent thereon, it was said that a new policy had found expression in the legislation of Congress, the purpose of which was the breaking up of tribal relations, the establishment of separate Indians in individual homes, free from national guardianship and charged with all the rights and obligations of citizens of the United States. The court said:

‘Of the power of the government to carry out this policy there can be no doubt.

It is under no constitutional obligation to perpetually continue the relationship of guardian and ward. It may, at any time, abandon its guardianship and leave the ward to assume and be subject to all the privileges and burdens of one *sui juris*. And it is for Congress to determine when and how that relationship of guardianship shall be abandoned. It is not within the power of the courts to overrule the judgment of Congress. It is true there may be a presumption that no radical departure is intended, and courts may wisely insist that the purpose of Congress may be made clear by its legislation, but when that purpose is made clear, the question is at an end.'

"In a former treaty between the Kickapoos, concluded June 28, 1862 (Revision of Indian Treaties, art. 3, p. 449), it was provided:

'At any time hereafter, when the President of the United States shall have become satisfied that any adults, being males and heads of families, who may be allottees under the provision of the foregoing article, are sufficiently intelligent and prudent to control their affairs and interests, he may, at the requests of such persons, cause the land severally held by them to be conveyed to them by patent in fee simple, with power of alienation; and may, at the same time, cause to be * * * (set apart and placed to their credit severally) their proportion of the cash value of the credits of the tribe, princi-

pal and interest, then held in trust by the United States, and also, as the same may be received, their proportion of the proceeds of the sale of lands under the provisions of this treaty. And on such patents being issued, and such payments ordered to be made by the President, such competent persons shall cease to be members of said tribe, and shall become citizens of the United States; and thereafter the lands so patented to them shall be subject to levy, taxation, and sale, in like manner with the property of other citizens.'

"In construing the two treaties the court said:

'Now the act of 1887 was passed 25 years after the treaty of 1862 with the Kickapoos, and must be construed in the light of that treaty. By the treaty it was declared that at the instance of the President, and upon compliance with specified provisions, certain of the Indians should be considered as competent persons, should cease to be members of the tribe, and become citizens of the United States.'

"It was said that, the act of 1887 being a police regulation, it could not be doubted that an act of Congress, attempting as a police regulation to punish the sale of liquor by one citizen of the state to another, within the territorial limits of that state, would be an invasion of the state's jurisdiction, and could not be sustained, and it would be immaterial what the antecedent

status of either buyer or seller was. The point decided by the court was that when the United States granted the privilege, or privileges, of citizenship to an Indian, gave to him the benefit of, and required him to be subject to, the laws, both civil and criminal of the state, it placed him outside the reach of police regulations on the part of Congress; that the emancipation from federal control, thus created, could not be set aside at the instance of the government, without the consent of the individual and the state; and that this emancipation from the federal control was not affected by the fact that the lands it had granted to the Indian were granted subject to a condition against alienation or incumbrance, or the further fact that it guaranteed him an interest in tribal or other property. The difference in the facts before the court in the *Heff* case, and those before us, in no way makes the decision in that case an authority. Without enumerating these distinctions, several of which stand out conspicuously, it is sufficient to say that in no case, involving as it did a police regulation, there had been, by express congressional enactment, an emancipation of the Indian from federal control, and by the express terms of which he became subject to both the civil and criminal laws of the state in which he resided. Here no such abdication of power or surrender of control, appears, but instead, as already seen, the various acts of Congress, touching the question of both the form of removal and imposition of restrictions, gave evidence conclusive of an intention on the part of the general government

to continue, for the time being, its relation of guardianship over full-blood Indians.

“At the date of the passage of the act of April 26, 1906, the Choctaw and Chickasaw Indians were residents of, and their lands were situated in, an unorganized territory. Their tribal governments were shorn of all power, and existed in name only. There was none other to control and manage their affairs than the general government. The legislation of Congress in behalf of the full-blood Indians is a matter of current history. No less, so, however, is the vigilance and activity displayed in the other branches of government, brought about by congressional enactment. Many suits were brought by the United States in carrying out its policy of protection to those whom Congress regarded as dependents and in need of protection. Indeed, at all times, on and since the passage of the act, has the government shown a most determined and persistent purpose to continue the exercise of the authority derived from its guardianship relation, and in the Enabling Act to see that the power was reserved to it.

“A case sometimes cited as authority for a conclusion different from that which we have reached is *Jones v. Meehan*, 175 U. S. 1, 20 Sup. Ct. 1, 44 L. ed. 49, where, however, a quite different question was before the court. In that case, Moose Dung, the younger, the heir at law of the senior Moose Dung, in 1891, executed to the Meehans a lease to certain lands which had been set apart to his father during the latter's

lifetime, and of which estate the younger Moose Dung was the sole heir at law. Afterwards, in 1894, said younger Moose Dung executed a second lease to said lands to Jones. Subsequent thereto, and during the same year, Congress passed a joint resolution authorizing the Secretary of the Interior, in his discretion, to approve the latter lease. This was afterwards done, and the contest over the possession arose between the two lessees, a portion of the terms of the leases running concurrently. It was held that the elder Moose Dung, having acquired a complete title in fee simple, his heir, upon whom the estate devolved at his death, had the right to make the original lease, and that the interests of the lessees acquired thereby could not be devastated by any subsequent action of the lessor, or by Congress, or of the executive department of the government. The court said:

‘The congressional resolution of 1894, and the subsequent proceedings in the Department of the Interior, must therefore be held to be of no effect upon the rights previously acquired by the plaintiffs by the lease to them from the younger chief.’

‘The decision, therefore, is not an authority for the contention that Congress is without power to impose restrictions on alienable allotted lands of full-blood Indians.

‘It may be well to note that the act enjoined upon the Secretary of the Interior is in no sense judicial, but, on the other hand, is purely ministerial. *Jennings v. Wood*, 192 Fed. 507,

112 C. C. A. 657. It follows the making of a bargain between the heir or heirs and the intending purchaser. The Secretary's jurisdiction is invoked only when the conveyance is presented to him for his approval. As was said in the above case:

'His connection with the transaction and his authority first arose after the minds of the contractors came together, and they must have been competent to make the contract submitted for approval. A disapproval was merely a veto.'

"The rule that the act is ministerial is the same under the act of May 27, 1908, requiring the approval by the county courts of the deed of fullblood heirs. *Tiger v. Creek County Court*, 146 Pac. 912; *Bartlett v. Okla. Oil Co. et al* (D C.) 218 Fed. 380.

"It should be remembered that the lands, the title to which is in controversy, were allotted to Cerna Wallace during her lifetime. What effect, if any, the act of 1906 would have on conveyances made by the full-blood Indian heirs of enrolled tribal members who died subsequent to enrollment, but before selecting their allotments, and where allotments were thereafter duly made in their name or on behalf of their heirs, not being directly involved, is not determined, and anything herein is not intended to affect the rights of such heirs or those holding under or through them * * * "

Premises considered, the defendant in error, Rachel James, prays that the decision of the Supreme Court of Oklahoma may be affirmed.

Respectfully submitted,

A. M. WORKS,

Hugo, Okla.

JOSEPH C. STONE,

Muskogee, Okla.

Attorneys for Defendant in Error.

APPENDIX "A"

*In the District Court of the United States for the
Eastern District of Oklahoma.*

INDIAN LAND SUITS.

Supplemental Opinion on Demurrers to Govern-
ment's Bills to Set Aside Alleged Illegal Con-
veyances of Lands of the Five Civilized Tribes.

(Filed October 30, 1912.)

CAMPBELL, D. J. :

In the opinion rendered August 14th, last, in the so-called Indian Land Suits, covering several questions raised upon the demurrer shortly before that time, one question arising at the hearing and by the court taken under advisement was not adverted to in the briefs of counsel and was not covered by the opinion then filed. That question is as to the power of Congress to reimpose restrictions or to impose restrictions where none originally existed. It arises from a consideration of the effect of section 22 of the Act of April 26, 1906, wherein it is provided that the adult heirs of any deceased Indian of either of the Five Civilized Tribes, whose selection has been made, or to whom a deed or patent has been issued for his or her share of the lands of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent, with the provis-

ion that all conveyances made under this provision by heirs who are full-blood Indians, are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe. At the time this act was passed (April 26, 1906), certain of the lands of the Five Civilized Tribes theretofore allotted, had become unrestricted by reason of the expiration of time during which restrictions originally placed upon them were to exist, and certain other portions of said lands had never been restricted. An example of the first class mentioned would be such homestead lands as had theretofore become alienable by the death of the original allottee; an example of the second class mentioned would be lands in the Choctaw and Chickasaw Nations, allotted to the heirs of a deceased member of the tribe who had died before making his selection or receiving his allotment, the class of lands involved in the *Mullen-Jansen* case.

The Act of April 26, 1906, is general in its nature, applying to every one of the Five Civilized Tribes, and, as its title indicates, contemplated the final disposition of the affairs of these tribes. Section 19 of the act makes inalienable for the period of 25 years from and after the passage of the act all the lands allotted to fullblood members of the several tribes. Where, at the time of the passage of the act, the land affected was still under restrictions, its effect was to extend the period of restrictions. Where by operation of law, restrictions theretofore imposed upon such lands had been terminated, it is the clear purpose of the act to reimpose restrictions for the period mentioned.

Section 22 imposes a condition in the nature of a restriction upon the alienation by fullblood heirs of lands inherited by them from any deceased Indian of the Five Civilized Tribes, and here also it appears to have been the intention of Congress to reimpose this restriction upon the alienation where by operation of law restrictions theretofore imposed had expired, and to impose it even upon inherited lands, though they might have been previously alienable in the hands of the ancestor or the fullblood heirs.

In view of the doctrine announced by the Supreme Court of the United States in *Tiger v. Western Investment Co.*, 221 U. S. 286, I have no doubt of the power of Congress, by the Act of April 26, 1906, to reimpose restrictions where restrictions had theretofore passed off by operation of law, or to impose the restrictions where none had theretofore existed. These full-blood Indians were then and are now wards of the government under the guardianship of Congress, so far as the disposition of their lands is concerned. That guardianship must be deemed to continue until it clearly appears that Congress has renounced it. While in the *Tiger* case, *supra*, the lands involved were still under restrictions at the time the act extending restrictions was passed, and that fact is mentioned in the opinion. I do not construe the opinion as basing the decision upon that fact, but rather upon the fact that the guardianship of Congress as to these fullbloods existed at the time the act was passed and must be considered as existing until Congress itself shall terminate it. I do not construe the *Tiger* case as holding that the mere fact

that restrictions previously placed upon the land of a full-blood Indian might have passed off by reason of the lapse of the time for which they were imposed, would of itself evidence an intention of Congress to permanently withdraw all guardianship of such Indian so far as such land is concerned. But that so long as Congress maintains any guardianship over the person and property of such Indian, it alone can determine to what extent that guardianship shall be exercised, and it may increase or decrease the scope of the same from time to time as it may deem best.

I therefore conclude that the Congress was acting within its constitutional powers in passing this legislation.

(Signed) RALPH E. CAMPBELL, Judge.

Office Supreme Court, U.S.
FILED
JAN 9 1917
JAMES D. MAHER
CLERK

IN THE
Supreme Court
OF THE
UNITED STATES

J. H. BRADER,

Plaintiff in Error,

vs.

RACHEL JAMES *nee* REEVES,

Defendant in Error,

No. [REDACTED] 12

MOTION FOR ADVANCEMENT OF CAUSE.

D. M. TIBBETTS,
E. A. BLYTHE,
FRED W. GREEN,
Solicitors for Plaintiff in Error.

A. M. WORKS,
Solicitors for Defendant in Error.

IN THE
Supreme Court
OF THE
UNITED STATES

J. H. BRADER,

Plaintiff in Error,

vs.

RACHEL JAMES *nee* REEVES,

Defendant in Error,

} No. 415

MOTION FOR ADVANCEMENT OF CAUSE.

TO THE HONORABLE THE JUDGES OF THE SUPREME
COURT:

The plaintiff in error respectfully moves the court to advance the above cause and assign the same for hearing upon oral arguments as soon as may be convenient to the court and

to fix the time within which the respective parties hereto shall file printed briefs therein, and in support of said motion, the plaintiff in error states:

That this is a proceeding in error from the highest court of the State of Oklahoma, to-wit, the supreme court of said state, and involves among other things, and chiefly the matter of the interpretation and construction of Section 19 of an act of Congress approved April 26, 1906 (34 Stat. at Large, 137). That said controversy requires in particular a determination of whether or not the above mentioned act has the effect, by reimposing restrictions, of prohibiting the conveyance of a homestead allotment made to a member of the Chickasaw or Choctaw Tribe of Indians during his life time, but which is inherited by his heir-at-law, a full-blood member of such tribe prior to the passage of the above mentioned act and wherein the attempted conveyance is made by such heir after said act has taken effect, said deed of conveyance not having been approved by the Secretary of the Interior.

That said question becomes involved in this cause by reason of the following facts: That a portion of the real estate involved in this controversy was duly allotted to one Serena Wallace, a member of the Choctaw tribe of Indians by blood, during her life time. That the said Serena Wallace died on the 27th day of October 1905, leaving as her sole heir at law, the defendant in error, Rachel James *nee* Reeves, a

(3)

member of the full-blood of the Choctaw tribe of Indians. That thereafter, on or about September 20, 1907, the said Rachel James made conveyance of said real estate to one Tillie Brader who thereafter conveyed the same to the plaintiff in error, J. H. Brader. That the plaintiff in error went into possession of said premises and was in possession thereof at the commencement of this action which originated as an action to recover possession of said premises together with damages for detention of the same and to quiet title in the plaintiff therein, Rachel James who is now defendant in error in this cause.

That it is important that this cause should be advanced for early hearing by reason of the fact that uncertainty exists as to the title of numerous tracts of land in the State of Oklahoma and a large number of cases are pending in the supreme court and trial courts of the State of Oklahoma, awaiting a determination of the questions herein involved by this Honorable Court.

The plaintiff in error further states that the Judge of the District Court of the United States for the Eastern District of Oklahoma has arrived at conclusions directly opposite to the decision of the Supreme Court of Oklahoma in this cause, and the United States Circuit Court of Appeals for the Eighth Circuit has announced doctrine which appears to be at variance with the conclusions of the Supreme Court of Oklahoma,

by reason whereof, titles to large tracts of land as aforesaid, are in an unsettled condition and will so remain until after a decision by this court.

Respectfully submitted,

A. M. J. J. J. J.

E. A. Blythe

Fred W. Green

Solicitors for Plaintiff in Error.

Service of the foregoing motion is hereby acknowledged
this.....day of December, A. D., 1916.

.....
Solicitors for Defendant in Error.

7
U.S. Supreme Court, D. C.
JAN 26 1917

WILLIAM D. BENTLEY,
CLERK.

IN THE

Supreme Court of the United States

J. H. BRADER,

Plaintiff in Error,

vs.

RACHEL JAMES, *formerly*

RACHEL REEVES,

Defendant in Error.

No. 126

October Term, 1917.

Reply to Brief of the United States as Amicus Curiae

D. M. TIBBETTS,

FRED W. GREEN,

Of Counsel for Plaintiff
in Error.

IN THE

Supreme Court of the United States

J. H. BRADER,

Plaintiff in Error,

VS.

RACHEL JAMES, *formerly*

RACHEL REEVES,

Defendant in Error.

No. 126

October Term, 1917.

REPLY TO BRIEF OF THE UNITED STATES AS AMICUS
CURIAE.

While it might seem unnecessary that anything further should be said in this case, yet in view of certain questions propounded by the court upon the argument in reference to a letter written by the legal advisor of the Interior Department under date of January 29th, 1907 construing the Act in question, we ask indulgence of the court to make answer to those questions more fully than was possible upon the argument and in that connection to briefly reply to the argument advanced by the United States in its brief amicus curiae.

That brief on page three, after calling attention to the provisions of Section 22 of the Act of April 26th, 1906, says:

"So that if section 22 stood alone it would be difficult to contend that the permission to convey had reference to such unrestricted class so as to subject conveyances of that class by full blood heirs to approval by the Secretary." etc.

It therefore appears to be conceded by the Government that the interpretation of section 22, if standing alone, would be in accordance with the contention of the Plaintiff in Error in this case, but counsel for the Government insists that section 19 of the Act applies to restrict lands of the character involved in this case and that section is set out in full on pages three and four of his brief. This is the first time, to our knowledge, that it has ever been suggested that section 19 could possibly apply to inherited lands. In fact, the terms of that section in themselves make it very clear that section 19 applies only to lands held by an Indian through allotment and not by inheritance. It provides:

"That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any manner *any of the lands allotted to him* for a period of twenty-five years" etc.

The character of the restriction imposed makes it evident that the inherited lands were not contemplated by section 19, for the restriction imposed by that section is a period of twenty-five years from the passage and approval of the Act, while the restrictions imposed upon inherited lands where the restriction applies is that conveyances by full-blood Indians made under that provision are subject to the approval of the Secretary of the Interior under such rules and regulations as he may prescribe, but otherwise permitting alienation at any time. In short, we do not think it fairly open to argument that section 19 in any respect applies to inherited lands, and in this connection we call attention to the decisions of this court in the following cases:

Tiger vs Western Investment Co. 221 U. S. 286 at p. 306.

Mullen vs United States 244 U. S. 448.

(3)

If we are correct, therefore, as to the application of section 19, the result is that the contention of the Plaintiff in Error as to the construction of the Act of April 26th, 1906 as applied to the conveyance in question of this case is conceded. It is apparent that the Government bases its sole argument upon the supposition that section 19 may be looked to as the basis for restrictions upon this class of conveyances. It is said on page five of the Government's brief:

"Hence although it be true that section 22 dealt with no unrestricted allotment, yet, since section 19 restricted all full blood allotments for a given period, the permission granted to heirs of deceased Indians to sell inherited lands, and the subjection of sales 'under this provision' by full blood heirs to the approval of the Secretary, related alike to all full blood allotments."

If the construction of the Act, as contended for by us and impliedly conceded by the Government, as above suggested, should be adopted by the court, it is, of course, unnecessary to consider the power of Congress to impose the restrictions, as there would be no occasion in this case to consider such power. However, in order to cover both phases of the case we now desire to briefly advert to the suggestions offered by the Government as to the power of Congress in this connection.

It being borne in mind that the land herein involved came into the hands of Rachel James free from restrictions prior to the passage of the Act of April 26th, 1906, we call attention to the statement in the brief of the Government at page eight, where it is said:

"If this were a case of a full blood Indian conveyance made after expiration of the original restriction period and before the Act of 1906, and if Congress had attempted to avoid such a conveyance, the Act to that extent would be indefensible."

Where does this logically lead? Certainly to a conveyance to a white man. Suppose the conveyance had been made to a full blood Indian of one of the Five Civilized

Tribes. Would it be argued that the Act applied to invalidate the conveyance and deprive the purchaser of the purchase price or to impose a restriction upon his alienation, simply because he was a full blood Indian? Yet that would be the necessary conclusion if the position of counsel is sound that the power of Congress to impose restrictions can be made to rest solely upon the relationship of guardian and ward. On such an assumption, if the Act restricted the land in the hands of Rachel James while she held it free from restrictions, it would be equally restricted had it passed by purchase to another full blood Indian prior to the passage of the Act. Logically, we think it must be held that if the land had been unrestricted in the hands of a white purchaser, as it is conceded would be the case, then it must be equally so in the hands of a full blood Indian purchaser, and by the same logic, it would be beyond the power of Congress to impose a restriction against the land in the hands of a full-blood who had obtained title by inheritance. The right or power to impose the restriction cannot logically be based solely upon the guardianship relation of the Government, but can only be sustained upon the basis of some retention of interest in the land itself by Congress, plus the guardianship relation, and these two conditions do not exist in the present case.

In response to counsel's comments on the case of *Choate vs Trapp* 224 U. S. 665, we call attention to the language of this court on page 677, citing *Jones vs. Meehan*, which involved a question very similar to that in the present case, as follows.

"His right of private property is not subject to impairment by legislative action, even while he is, as a member of a tribe and subject to the guardianship of the United States as to his political and personal status. This is clearly recognized in the leading case of *Jones vs. Meehan*, 175 U. S. 1."

The *Meehan* case, it will be remembered, related to the power of Congress to re-impose restrictions and did not involve tax exemptions.

DEPARTMENTAL CONSTRUCTION.

Both sides have devoted considerable attention to the action of the Department of Interior in connection with its course of dealing in relation to conveyances of this character, and it is stated in the brief of the Government that the extract from the letter of Honorable Frank L. Campbell, as set out in the brief of the Plaintiff in Error, is not an exact copy. That quotation, however, was made from a copy of the letter as generally circulated among attorneys and those interested in the purchase of such lands, and a comparison with the letter as set out in the appendix of the Government's brief establishes that there is absolutely no difference in meaning so far as it concerns the construction of section 22. It is clear that such variations as exist are wholly typographical. At the time of the preparation of our original brief we were of the opinion that the above mentioned letter indicated the practice of the Interior Department, and we believe our assumption to that effect is corroborated by a letter written to E. A. Blythe, Esq., attorney for the Plaintiff in Error herein, by the Honorable Charles Warren, Assistant Attorney General, dated September 17th, 1915, in answer to an inquiry made by Mr. Blythe as to whether or not the Department of Interior had departed from the ruling established by Mr. Campbell's letter. The letter to Mr. Blythe is as follows:

E K—CSE DEPARTMENT OF JUSTICE CSE-nep

177557-1

Washington, D. C.

September 17, 1915.

E. A. Blythe, Esq.,

Attorney at Law,

Hugo, Oklahoma.

Sir:

Receipt is hereby acknowledged of your letter of the 30th ultimo, relative to a case which you have pending on rehearing in the Supreme Court of the State of Oklahoma which involves the question as to whether the approval of the Secretary of the Interior be necessary to the valid-

ity of a deed of conveyance made under the provisions of Section 22 of the Act of April 26, 1906.

You inclose a copy of the opinion of the Secretary of the Interior, dated January 29th, 1907, and request that you be informed as to whether the Department of Justice has placed any further construction upon Section 22 of the Act of April 26, 1906. I have the honor to inform you that there seems to have been no later contrary construction placed upon Section 22 by either the Secretary of the Interior or the Attorney General. You will note, however, that the opinion quoted was written by the Assistant Attorney General for the Interior Department and was approved by the Secretary of the Interior. It was an opinion, or decision, of the Interior Department, and not an opinion of the Attorney General.

I find that the opinion of the Secretary of Interior, as quoted in the pages of the brief which you sent me, is not an exact copy of the opinion as rendered. I have corrected the errors and return the opinion herewith.

Respectfully,

For the Attorney General,

(Signature)

CHARLES WARREN,
Assistant Attorney General.

Inclosure 60017.

WWD

It was stated upon the argument that such a letter had been received by Mr. Blythe but he did not have the letter with him, and this letter covers one of the questions propounded by the court as to whether or not Mr. Campbell's letter had been acted upon or had been recalled. The above letter makes it clear at least that no contrary construction of section 22 had been adopted by the Department of the Interior up to September 17, 1915. Mr. Campbell's letter had been generally circulated soon after its date as indicative of the practice of the Interior Department, and while we are not in a position to state with certainty whether or not the Department of the Interior followed that construction in all cases, we are able to say that the letter was quite generally known among attorneys throughout that portion of Oklahoma occu-

pied by the Five Civilized Tribes and those investing in lands, and that in very many instances deeds or mortgages were taken chiefly, if not wholly, in reliance upon the interpretation placed upon the Act of April 26th, 1906, as indicated by Mr. Campbell's letter. It is, of course, argued in behalf of the Defendant in Error that the action of the Attorney General's office in the institution of a series of litigation, commonly referred to as the 30,000 land suit, indicated a contrary practice on the part of the Department of Interior. We do not think this necessarily follows, for those actions chiefly involved questions of other kinds and those suits were directly under the supervision of the office of the Attorney General, rather than the Interior Department, and in any event do not indicate any contrary practice by the Department of Interior from the time of the passage of the Act until those suits were commenced almost two years later. Therefore, it would seem, in any event, that investments made after the date of Mr. Campbell's letter and prior to the commencement of the 30,000 land suits ought to be upheld if possible in view of the evident practice of the Interior Department.

In fact, a situation exists which would no doubt work an estoppel, unless that effect is obviated by the fact that the lands involved belonged to Indians, but whatever may be the situation, whether in the nature of an estopped or established practice on the part of the Interior Department, it seems clear that this interpretation as announced by the Interior Department ought to be most persuasive upon this court in the construction of the Act as applied to the conveyance in controversy in this case.

As stated upon the argument of the case, it is probably true that very few Indians will be affected one way or the other by the decision of this case and that in a vast majority of instances the question exists between persons who have taken title from the Indian, one without the approval of the Secretary of Interior and the other by subsequent conveyance approved by the County Court, or perhaps in some instances by the Secretary of the Interior, so that it is not evident in what way the Government in behalf of the Indians is to any considerable extent interested in the determination of this controversy.

(8)

We, therefore, believe the decision of the Supreme Court of the State of Oklahoma should be reversed.

Respectfully submitted,

D. M. TIBBETTS, and

FRED W. GREEN.

Of Counsel for Plaintiff in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1917.

J. H. BRADER, *Plaintiff in error*,
v.

} No. 126.

RACHEL JAMES, formerly RACHEL REEVES.

IN ERROR TO THE SUPREME COURT OF THE STATE OF
OKLAHOMA.

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE.

THE QUESTION PRESENTED.

With respect to allotted lands of deceased full blood Indians of the Five Civilized Tribes, inherited by full bloods, and freed from restriction against alienation prior to April 26, 1906, two questions are presented, namely: (1) whether it was intended by section 22 of the Act of April 26, 1906 (34 Stat. 137, 145), to subject conveyances by such full blood heirs to the approval of the Secretary of the Interior; and (2) if such was the intention, whether the provision is constitutional.

The Government is interested in maintaining the affirmative of both these propositions.

I.

AS TO THE INTENTION OF THE ACT.

Section 22 reads as follows (34 Stat. 145):

SEC. 22. That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States court for the Indian Territory. And in case of the organization of a State or Territory, then by a proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe.

The words in the first sentence, "may sell and convey the lands inherited," undoubtedly import permission to sell and convey, which was only necessary in the case of restricted lands; and the words in the final sentence, "conveyances made under this provision," can hardly be said to refer to any conveyance other than those permitted in the first sentence. When this Act was passed there were allotments of

full-blood Indians then freed from restriction by death of the allottee or by lapse of time, and there were others yet subject to restriction. So that if section 22 stood alone it would be difficult to contend that the permission to convey had reference to such unrestricted class so as to subject conveyances of that class by full blood heirs to approval by the Secretary. But section 19 of the Act imposed restrictions on all full blood allotments, except such unrestricted ones as had already been conveyed. Section 19 reads as follows (34 Stat. 144):

Sec. 19. That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this Act, unless such restriction shall, prior to the expiration of said period, be removed by Act of Congress; and for all purposes the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior: *Provided, however,* That such full-blood Indians of any of said tribes may lease any lands other than homesteads for more than one year under such rules and regulations as may be prescribed by the Secretary of the Interior; and in case of the inability of any full-blood owner of a homestead, on account of infirmity or age, to work or farm his homestead, the Secretary of the Interior, upon proof of such inability,

may authorize the leasing of such homestead under such rules and regulations: *Provided further*, That conveyances heretofore made by members of any of the Five Civilized Tribes subsequent to the selection of allotment and subsequent to removal of restriction, where patents thereafter issue, shall not be deemed or held invalid solely because said conveyances were made prior to issuance and recording or delivery of patent or deed; but this shall not be held or construed as affecting the validity or invalidity of any such conveyance, except as hereinabove provided; and every deed executed before, or for the making of which a contract or agreement was entered into before the removal of restrictions, be and the same is hereby, declared void: *Provided further*, That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee.

By this section restriction against alienation for twenty-five years, unless sooner removed by Act of Congress, was placed upon all allotments of full blood Indians, whether then subject to restriction or not, except unrestricted lands which had theretofore been sold. The plain language to such effect is not susceptible of any exception, and the exception of previously unrestricted lands should not be imported into it unless that should be necessary to save its constitutional validity as to restricted lands. The provision that "such full blood Indians of any of said tribes may lease *any lands* other than

homesteads" under supervision of the Secretary is consistent only with the intention to place all lands allotted to full bloods under the twenty-five year restriction. And the plain exception from the operation of the section of previous conveyances made "subsequent to removal of restriction" means nothing if not that unrestricted allotments of full bloods which had not been conveyed were intended to be restricted. Hence, although it be true that section 22 dealt with no unrestricted allotment, yet, since section 19 restricted all full blood allotments for a given period, the permission granted to heirs of deceased Indians to sell inherited lands, and the subjection of sales "under this provision" by full blood heirs to the approval of the Secretary, related alike to all full blood allotments.

No reason can be suggested, except the constitutional one, for making any distinction between different full bloods. All alike were dependent Indians, members of existing tribes, under the Federal guardianship and in need of protection by competent authority. It was in view of this condition, and with a consciousness of the duty of protection which the Nation still owed to full blood Indians as a class, that by the Act of April 26, 1906, Congress adopted "a comprehensive system of protection as to such Indians." *Tiger v. Western Investment Co.*, 221 U. S. 286, 306.

An illustration of this policy is found in the Acts of June 21, 1906 (34 Stat. 325, 353), and March 1, 1907 (34 Stat. 1015, 1034), which vested unrestricted

titles to allotments in all mixed blood Chippewa Indians on the White Earth Reservation, regardless of actual competency or quantum of Indian blood, and retained in trust titles to allotments of all full blood Chippewas on the same reservation. *United States v. First National Bank*, 234 U. S. 245, 258; *United States v. Waller*, 243 U. S. 452, 452.

The understanding of Congress as to the scope of this policy is shown by the Act of May 27, 1908, § 9 (35 Stat. 312, 315), which provided that the death of any allottee of the Five Civilized Tribes should operate to remove "all restrictions upon the alienation of said allottee's land," except that "no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved" by a competent court.

Counsel for plaintiff in error (Messrs. Tibbetts and Green) at page 29 of their brief refer to an opinion given by Assistant Attorney General Campbell for the Interior Department on January 29, 1907, which supports their contention. This opinion is not reported and, as counsel quote only a part, it is printed in full as an appendix to this brief. Neither the Secretary of the Interior nor the Attorney General has followed this opinion. A letter from the Secretary showing the practice of the Interior Department to the contrary is also printed in the appendix. In accordance with this practice, a great number of suits were instituted in 1908 and 1909 by the Attorney General in the eastern district of Oklahoma to set aside deeds of Indian allotments

made in violation of restrictions upon alienation. These suits were "brought on the recommendation of the Secretary of the Interior" as authorized by the Act of Congress of May 27, 1908 (35 Stat. 312, 315, § 6). Among them is a large class involving conveyances of the character of the one now before this court. It was with reference to this class that District Judge Campbell, on October 30, 1912, filed an opinion sustaining our present contention. A copy of that opinion is also printed in the appendix. See also *Youngken v. David*, 235 Fed. 621, 624; *Harris v. Bell*, 235 Fed. 626. More particularly, one of these suits, as shown by bill No. 457 at page 112, seeks the cancellation of a deed executed by Rachel James, the present defendant in error, to one Cruce. This deed was dated September 18, 1906, and purports to convey the land inherited from Serena Wallace and involved in the case at bar, which was afterwards deeded to Tillie Brader, the present plaintiff in error, on August 17, 1907. The bill in that case was filed January 2, 1909. The proceedings in that and other cases of a like character are suspended to await the decision of this court on the question now presented.

II.

AS TO THE POWERS OF CONGRESS.

It is contended for the plaintiff in error that Congress is without power to impose a restriction against alienation upon unrestricted lands of full blood Indians. The constitutional provision invoked is

that which forbids the taking of property without due process of law.

If the Act in question were retrospective in its operation there would be ground for the contention. If this were a case of a full blood Indian conveyance made after expiration of the original restriction period and before the Act of 1906, and if Congress had attempted to avoid such a conveyance, the Act to that extent would be indefensible. But the case is very different. The Indian deed in question was executed August 17, 1907 (R. 13), and the act itself in section 19 is careful to except from its operation all previous conveyances of unrestricted allotments.

It is said that the Indian's unrestricted right to sell is taken away for a time, and that this is the taking of a property right. But this was done for the Indian's protection and the Indian is not complaining. This protection was in the judgment of Congress necessary to prevent the Indian from being despoiled of his property by designing persons, and it is difficult to see how the complaint of his grantee can be considered otherwise than as the insistence upon a vested right to despoil the Indian.

In *Tiger v. Western Investment Co.*, 221 U. S. 286, it was held that Congress had the power to extend the period of restriction on full blood allotments. There is no substantial difference, so far as concerns the Indian's property right, between the extension of an existing restriction period and the reimposition of the same restriction for a given time after the expiration of the original period. The reasons which

justify such action are the same in the one case as in the other. Notwithstanding the grant of citizenship and the removal of restrictions, the duty of protection which the Nation owes to dependent Indians is not discharged and the national honor which has been pledged to the fulfilment of that obligation remains. Even the grant of citizenship to tribal Indians may be, as it has been in a measure, retracted. *United States v. Pelican*, 232 U. S. 442, 450-451. The power to deal with their affairs is not to be measured by a single act of hasty legislation. *United States v. Celestine*, 215 U. S. 278, 290-291. The national interest in them is not to be expressed in terms of property. *Heckman v. United States*, 224 U. S. 413, 437. So long as they are maintained as wards of the Nation—and it is not to be denied that the full bloods of the “Five Civilized Tribes” are still so maintained—the power to adopt any measure which in the judgment of Congress is needful for their protection is “a continuing power of which Congress could not divest itself.” *United States v. Nice*, 241 U. S. 591, 600.

The case of *Choate v. Trapp*, 224 U. S. 665, is cited for the plaintiff in error. It was there held that Congress could not extinguish an exemption from taxation of Indian allotments which had been granted in consideration of an agreement between the Government and the Indians. There is a broad distinction between the extinguishment of a contractual exemption from taxation and the creation

of a restriction on alienation. In the case of a dependent Indian, the distinction is that which exists between taking his property and protecting him in the enjoyment of it.

United States v. Waller, 243 U. S. 452, is also cited. In that case it was held that the Government had no capacity to sue in behalf of mixed blood Chippewa Indians to recover allotments of which they had been vested by Congress with titles in fee simple and of which they had been defrauded. The Indians, being of mixed blood, had been adjudged by Congress to be competent to manage their own affairs, and there had been no subsequent measures adopted for their protection. Even as mixed bloods, if they were still maintained as members of a tribe in a condition of tutelage, and Congress should now determine that they were in need of protection against their own improvidence, the power to reimpose restrictions on such of the allotments of incompetent Chippewas as had not been conveyed by them could scarcely be doubted. To deny such power is to say that Congress has not the power to right an admitted wrong to helpless Indians, resulting from its hasty action, by a measure appropriate to remedy the wrong in part and which injures nobody.

If a legislative restriction upon alienation of property, reasonably adapted to carry out a proper governmental purpose, amounts to a taking of such property within the meaning of the constitutional

inhibition, then all the state laws for the protection of the family homestead against improvidence are void. In some states, notably in Texas, the law forbids any conveyance by a married man of real property owned by him and occupied as a home without the joinder of his wife, whose separate acknowledgment must be taken. In Texas a deed of the homestead in which the wife does not join is absolutely void. *Stallings v. Hullum*, 89 Texas, 431. The state, of course, has power to remove this restriction and, having removed it, has power to reimpose it, as to future conveyances, for the same reasons that justified its adoption in the first place.

CONCLUSION.

It is respectfully submitted that the judgment of the Supreme Court of Oklahoma in this case should be affirmed.

FRANCIS J. KEARFUL,
Assistant Attorney General.

JANUARY 14, 1918.

APPENDIX.

W. C. P.

S. V. D.

DEPARTMENT OF THE INTERIOR,
OFFICE OF THE
ASSISTANT ATTORNEY GENERAL,
Washington, January 29, 1907.

24788-1906

Ind. Ter. Div.

The SECRETARY OF THE INTERIOR.

SIR: You have submitted the papers relating to the approval of the deed executed under the direction of the United States court by the curator of the estate of Willis and Richardson Watson, minor full-blood Choctaw Indians, covering 120 acres of land originally allotted to their father, Robinson Watson, saying:

In view of sections 19, 20, and 22 of the act of Congress approved April 26, 1906 (34 Stat., 137), your opinion is requested in the matter.

The land in question, being the SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$, the SW. $\frac{1}{4}$ of NW. $\frac{1}{4}$, the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, and the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, sec. 25, T. 5 S., R. 1 E., in the Choctaw Nation, Indian Territory, was allotted Robinson Watson, a Choctaw by blood, as a homestead May 28, 1903, and homestead patent executed in his favor was filed for record in the

office of the Commission to the Five Civilized Tribes September 18, 1905.

It is alleged in the petition for sale of these lands that they were set apart to Willis Watson and Richardson Watson as their part of the land belonging to the estate of their deceased father, Robinson Watson. March 31, 1906, after due notice thereof, C. D. Wortham, as curator, filed in the United States Court for the Southern District of Indian Territory application to sell said real estate for the education and support of said minors. An order was that day made directing such sale to be made May 12, 1906, and appraisers were appointed to view and appraise the property. They appraised it at \$1,200, and the property was sold May 12, for \$1,100. This sale was subsequently approved by the court and deed executed thereon May 14, 1906. In view of the provisions of section 22 of the act of April 26, 1906, the Department has been asked to give its approval to this sale.

In the act of June 28, 1898 (30 Stat., 495, sec. 29), it was provided that each allottee of the Choctaw and Chickasaw tribes of Indians should select from his allotment a homestead of 160 acres for which he should have a separate patent and which should be inalienable for twenty-one years from date of patent. In the act of July 1, 1902 (32 Stat., 641), it is provided that each member of said tribes shall at the time of selecting his allotment designate as a homestead land equal in value to 160 acres of the average allotable land of the Choctaw and Chickasaw Nations "which shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of the certificate of allotment, and separate certificate and patent shall issue for said homestead."

III

Certificate and patent for the land in question issued to Robinson Watson, as a homestead, and under the terms of this provision of law descended at his death to his heirs, free of any restriction upon alienation.

The act of April 28, 1904 (33 Stat., 573), contains the following provision:

All the laws of Arkansas heretofore put in force in the Indian Territory are hereby continued and extended in their operation so as to embrace all persons and estates in said Territory, whether Indian, freedmen, or otherwise, and full and complete jurisdiction is hereby conferred upon the district courts in said Territory in the settlements of all estates of decedents, the guardianships of minors and incompetents, whether Indians, freedmen, or otherwise.

These minors and their lands, held by them free from any restriction upon alienation, were within the jurisdiction of the United States court as described in this law, and it had, at the time the petition for sale was presented, full authority to entertain the petition and to direct the sale.

You refer to sections 19, 20, and 22 of the act approved April 26, 1906, as presumably having significance in connection with this matter. Section 19 provides "that no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes shall have power to alienate, sell, dispose of, or incumber in any manner, any of the lands allotted to him for a period of 25 years from and after the passage and approval of this act unless such restriction shall, prior to the expiration of said period, be removed by act of Congress." This provision relates to allottees and not to heirs of allottees, and has no bearing on the question presented here. Section 20 refers exclusively to

leases and rental contracts and does not affect this case. Section 22 reads as follows:

That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States court for the Indian Territory. And in case of the organization of a State or Territory, then by a proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe.

This section provides the manner in which sales may be made, notwithstanding any restriction upon alienation, and seems to apply to the heirs of all deceased allottees without regard to quantum of Indian blood. It can not, however, be held to apply to heirs who received their inheritance freed of all restrictions. There would have been no occasion for this provision or field for its operation if the same provision that relates to homesteads had extended to the other or surplus allotted lands. The provision as to surplus lands of the Choctaws and Chickasaws in the act of July 1, 1902, *supra*, is that they may be alienated one-fourth in acreage in one year; one-fourth in three years; and the balance in five years from the date of patent. There is no permissible construction of said section 22 except that it applies,

so far as the Choctaws and Chickasaws are concerned, to those surplus lands which descend to the heir burdened with the restriction upon alienation and not to the homestead selections which descend to the heirs freed of all such restrictions.

If this be the proper construction of these laws, this department has no jurisdiction over the sale of lands thus held by minors freed of restrictions, and no function to perform in connection therewith. Believing that no other construction is permissible, I am of opinion, and so advise you, that the law does not require any action on your part in this matter.

The papers are herewith.

Very respectfully,

(Signed)

FRANK L. CAMPBELL,

Assistant Attorney General.

Approved:

January 29, 1907.

(Signed)

E. A. HITCHCOCK,

Secretary.

DEPARTMENT OF THE INTERIOR,

Washington, January 12, 1918.

DEAR MR. ATTORNEY GENERAL: Responsive to your inquiry, an examination has been made of our files to determine whether the opinion of the Assistant Attorney General for the Interior Department of January 29, 1907, construing section 22 of the act of April 26, 1906 (34 Stat. L., 137), was adopted in practice and subsequently followed by this department.

In that opinion Hon. Frank L. Campbell, then Assistant Attorney General for the Interior Depart-

ment, construing the provision in question, which reads as follows:

All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe;

expressed the view that it did not apply to conveyances by full-blood Indian heirs of lands which were allotted as a homestead to their ancestor who was a Choctaw citizen.

Although a careful search has been made of the files of this department, no case has been discovered, involving the point decided in said opinion, requiring action or consideration by this department prior to the approval of the act of May 27, 1908 (35 Stat. L., 312), section 9 of which provides, in part —

That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided*, That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee.

In view of this provision the Interior Department did not concern itself with such conveyances for a period of approximately one year, taking it for granted that its jurisdiction in such cases was at an end. However, an opinion was rendered by the Attorney General August 17, 1909 (27 Ops. Atty. Gen., 530), construing the above provision to apply only to conveyances made by the full-blood Indian heirs of allottees who died *after* said act became effective, with the further conclusion that where the allottee died *before* the act became effective the conveyance required the approval of the Secretary of the Interior pursuant to the Act of April 26, 1906, *supra*.

VII

Following this opinion a large number of deeds were submitted for the approval of the Secretary of the Interior. Many of these deeds were based on inadequate consideration and were several years old at the time presented, with result that additional consideration was required before the Secretary would approve the same. Many such deeds were approved upon payment of adequate consideration. During the period such deeds were being presented and acted upon two classes of cases were found to exist: (1) Where the lands were allotted during the lifetime of the allottee and descended by inheritance to his heirs, and (2) where the lands were allotted directly to the heirs after the death of the ancestor, to whom the allotment would have been made if living.

In the first of these classes the rule appears to have been to recognize the conveyance of homesteads as valid where the conveyance was made prior to the approval of said Act of April 26, 1906. This conclusion was based upon the decision of the Supreme Court in the Mullen-Jansen cases, rendered April 15, 1912 (224 U. S., 448), wherein the court noted at different points in the opinion that the conveyances then under consideration were made prior to April 26, 1906. The attitude of this Department in this respect is shown by the letter of Secretary Adams of September 27, 1912, in the case of Betsy Hancock, a deceased Choctaw, which was reiterated in the letter of Secretary Jones of January 11, 1913, relating to the same case.

In the second class of cases—where the allotment was made to the heirs direct—it was repeatedly held by this Department that conveyances by full-blood heirs made prior to April 26, 1906, were valid, following the opinion in the Mullen-Jansen case referred to above, but that after said date all inherited lands

were restricted as to full-blood Indian heirs. This is clearly evidenced by the following:

Decision of Secretary Adams of July 25, 1912, in the Benjamin Harrison case (Creek).

Opinion of Solicitor West of the Interior Department of December 6, 1913, in the Louis Francis case.

Opinion of Solicitor West of December 10, 1913, in the Lizzie Franklin case (Choctaw).

In all of these cases it is clearly held by the Department that the lands are subject to restrictions after the Act of April 26, 1906, until action by the Secretary.

The Department continued to approve deeds, as above indicated, until the decision of the Circuit Court of Appeals in *United States v. Knight* (206 Fed., 145), wherein it was held that all conveyances by full-blood Indian heirs required approval by the courts of Oklahoma pursuant to said Act of May 27, 1908.

I might add, as throwing light on the foregoing, that this Department was requested in 1913 by a certain trust company for an expression of opinion as to the validity of a deed executed by full-blood Indian heirs affecting the homestead of a deceased Choctaw allottee, and that Secretary Jones, while declining to pass specifically on the question of title, because of the hypothetical nature of the inquiry, advised the Company, July 17, 1913, in part, as follows:

With respect to the alienation of homesteads in the Choctaw and Chickasaw Nations, permit me to refer you to the decision of the Supreme Court in the case of *Mullen v. United States* (224 U. S., 448).

* * * * *

I am of the opinion it will prove safer in all cases to secure the approval of the county court of conveyances by full-blood Indians.

This Department maintains a corps of twenty Probate Attorneys in Oklahoma who represent full-blood Indian heirs in the local courts, pursuant to Rules of Procedure adopted by the Supreme Court of Oklahoma, effective July 15, 1914, and the act of the Oklahoma Legislature approved April 2, 1915 (Chap. 198, Session Laws, 1915). These Probate Attorneys are under the direct supervision of the Commissioner of Indian Affairs, and no distinction has ever been made in the instructions to them with respect to conveyances of homesteads in the Choctaw Nation.

The whole matter may be summed up with the statement that the rule stated in the said opinion of the Assistant Attorney General of January 29, 1907, did not become the settled rule of practice, but that, on the contrary, the Interior Department accepted as its fixed principle of action the view that all inherited lands were, as to full-blood Indian heirs, to be regarded as restricted after April 26, 1906.

Cordially, yours,

(Signed)

S. G. HOPKINS,
Assistant Secretary.

The honorable the ATTORNEY GENERAL.

IN THE DISTRICT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF OKLAHOMA.

INDIAN LAND SUITS.

Supplemental Opinion on Demurrers to Government's Bills to Set Aside Alleged Illegal Conveyances of Lands of the Five Civilized Tribes.

(Filed October 30, 1912.)

CAMPBELL, D. J.:

In the opinion rendered August 14th last in the so-called Indian Land Suits, covering several ques-

tions raised upon the demurrer shortly before that time, one question arising at the hearing and by the court taken under advisement was not adverted to in the briefs of counsel and was not covered by the opinion then filed. That question is as to the power of Congress to reimpose restrictions or to impose restrictions where none originally existed. It arises from a consideration of the effect of section 22 of the Act of April 26, 1906, wherein it is provided that the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made or to whom a deed or patent has been issued for his or her share of the lands of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent, with the provision that all conveyances made under this provision by heirs who are full-blood Indians, are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe. At the time this act was passed (April 26, 1906), certain of the lands of the Five Civilized Tribes theretofore allotted, had become unrestricted by reason of the expiration of time during which restriction originally placed upon them were to exist, and certain other portions of said lands had never been restricted. An example of the first class mentioned would be such homestead lands as had theretofore become alienable by the death of the original allottee; an example of the second class mentioned would be lands in the Choctaw and Chickasaw Nations, allotted to the heirs of a deceased member of the tribe who had died before making his selection or receiving his allotment, the class of land involved in the *Mullen-Jansen* case.

The Act of April 26, 1906, is general in its nature, applying to every one of the Five Civilized Tribes, and, as its title indicates, contemplated the final disposition of the affairs of these tribes. Section 19 of the act makes inalienable for the period of 25 years from and after the passage of the act all the lands allotted to full-blood members of the several tribes. Where, at the time of the passage of the act, the land affected was still under restrictions, its effect was to extend the period of restrictions. Where by operation of law, restrictions theretofore imposed upon such lands had been terminated, it is the clear purpose of the act to reimpose restrictions for the period mentioned.

Section 22 imposes a condition in the nature of a restriction upon the alienation by full-blood heirs of lands inherited by them from any deceased Indian of the Five Civilized Tribes, and here also it appears to have been the intention of Congress to reimpose this restriction upon the alienation where by operation of law restrictions theretofore imposed had expired, and to impose it even upon inherited lands, though they might have been previously alienable in the hands of the ancestor or the full-blood heirs.

In view of the doctrine announced by the Supreme Court of the United States in *Tiger v. Western Investment Co.*, 221 U. S. 286, I have no doubt of the power of Congress, by the Act of April 26, 1906, to reimpose restrictions where restrictions had theretofore passed off by operation of law, or to impose the restrictions where none had theretofore existed. These full-blood Indians were then and are now wards of the government under the guardianship of Congress, so far as the disposition of their lands is concerned. That guardianship must be deemed to

continue until it clearly appears that Congress has renounced it. While in the *Tiger* case, *supra*, the lands involved were still under restrictions at the time the act extending restrictions was passed, and that fact is mentioned in the opinion, I do not construe the opinion as basing the decision upon that fact, but rather upon the fact that the guardianship of Congress as to these fullbloods existed at the time the act was passed and must be considered as existing until Congress itself shall terminate it. I do not construe the *Tiger* case as holding that the mere fact that restrictions previously placed upon the land of a full-blood Indian might have passed off by reason of the lapse of the time for which they were imposed, would of itself evidence an intention of Congress to permanently withdraw all guardianship of such Indian so far as such land is concerned. But that so long as Congress maintains any guardianship over the person and property of such Indian, it alone can determine to what extent that guardianship shall be exercised, and it may increase or decrease the scope of the same from time to time as it may deem best.

I therefore conclude that the Congress was acting within its constitutional powers in passing this legislation.

(Signed)

RALPH E. CAMPBELL, *Judge*.

